No. [redacted]191

GEORGE H. [redacted], PETITIONER,

vs.

CENTRE COUNTY BANKING COMPANY AND JOHN M. SHUGERT, BANKRUPTS

No. [redacted]192

FLORENCE F. DALE, PETITIONER,

vs.

CENTRE COUNTY BANKING COMPANY AND JOHN M. SHUGERT, BANKRUPTS

No. [redacted]193

ANDREW [redacted], PETITIONER,

vs.

CENTRE COUNTY BANKING COMPANY AND JOHN M. SHUGERT, BANKRUPTS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR WRITS FILED OCTOBER 4, 1920

WRITS AND RETURNS FILED DECEMBER 31, 1920

(32,900, 32,901, 32,903)

(29,900, 29,901, 29,902)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 590

GEORGE R. MEEK, PETITIONER,

vs.

CENTRE COUNTY BANKING COMPANY AND JOHN M. SHUGERT, BANKRUPTS

No. 591

FLORENCE F. DALE, PETITIONER,

vs.

CENTRE COUNTY BANKING COMPANY AND JOHN M. SHUGERT, BANKRUPTS

No. 592

ANDREW BREEZE, PETITIONER,

vs.

CENTRE COUNTY BANKING COMPANY AND JOHN M. SHUGERT, BANKRUPTS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

District Court of the United States,

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

In Bankruptcy. No. 4268.

In the Matter of

JOHN M. SHUGERT, LAVINIA CATHERINE HARRIS, DECEASED; GEORGE R. MEEK, MARY C. HARRIS, FLORENCE F. DALE AND ANDREW BREEZE, INDIVIDUALLY AND TRADING AS CENTRE COUNTY BANKING COMPANY,

Bankrupts.

DOCKET ENTRIES.

June 30, 1922. Petition and schedules filed by John M. Shugert, at 8.18 a. m.

July 11, 1922. Order to show cause.

Subpœna awarded returnable June 26, 1922, directing George R. Meek and Mary C. Harris, Bellefonte, Centre County, Pa., Florence F. Dale, of Hazleton, Luzerne County, Pa., and Andrew Breeze, of Downington, Chester County, Pa., to show cause why the prayer of the petition should not be granted.

July 25, 1922. Præcipe for appearance of R. L. Bigelow, Esq., counsel for Florence F. Dale.

July 26, 1922. Schedules of Mary C. Harris.
Subpœna returned served upon George R. Meek, Mary C. Harris, and Florence F. Dale, personally, and as to Andrew Breeze, writ returned N. E. I.

July 27, 1922. Answer of George R. Meek, denying that he is a member of the firm or partnership of the Centre County Banking Company.

July 29, 1922. Answer of Florence F. Dale, denying that she is a member of the partnership of Centre County Banking Company.

Aug. 1, 1922. Order referring the petition and answers to M. Ward Fleming, Esq., Referee.

Aug. 9, 1922. Petition for alias subpœna and for service on Andrew Breeze by publication, and Order for service by publication.

Aug. 9, 1922. Alias subpœna issued returnable August 24, 1922.
Copy of petition in bankruptcy and alias subpœna mailed Andrew Breeze at his last known place of abode, to wit, Downington, Pa.

Aug. 15, 1922. Copy of order of court for publication mailed Gettig and Bower, Bellefonte, Pa.

Aug. 17, 1922. Request for trial by jury.

Aug. 15, 1922. Alias subpœna and petition returned marked "unknown."

Aug. 23, 1922. Petition of George R. Meek, for rule to show cause why Subpœna in Bankruptcy issued against him should not be quashed and set aside, and

Order granting rule returnable August 28, 1922, at ten o'clock a. m. at Sunbury, Pa.

Petition of Florence F. Dale for rule to show cause why Subpœna in Bankruptcy issued against her should not be quashed and set aside, and

Order granting rule returnable August 28, 1922, at ten o'clock a. m. at Sunbury, Pa.

Aug. 26, 1922. Petitions (9) to amend signed by John M. Shugert.

Amended petitions (9) of John M. Shugert.

Answers (4) of John M. Shugert to petition of George R. Meek.

Answers (4) of John M. Shugert to petition of Florence F. Dale.

Replication to answer filed by Geo. R. Meek.

Replication to answer filed by Florence F. Dale.

Aug. 28, 1922. Petition to amend and acceptance of service thereon.

Sept. 15, 1922. Motion of Geo. R. Meek, raising questions of jurisdiction.

Sept. 15, 1922. Motion of Florence F. Dale, raising question of jurisdiction.

Order allowing amended petition to be filed.

Order. "The amendment to the original petition as now presented is allowed and the Clerk is directed to issue a subpœna as prayed for in the petition as amended."

Sept. 18, 1922. Subpœna issued returnable October 3, 1922.

Sept. 22, 1922. Subpœna, Schedules, Amended petition and Order mailed Andrew Breeze, Downington, Pa.

Sept. 26, 1922. Subpœna returned from Downington, Pa., marked, "not at Downington, Pa."

Oct. 3, 1922. Subpœna returned served upon George R. Meek and Florence Dale and acceptance of service by Mary C. Harris and as to Andrew Breeze, N. E. I.

Motion of Florence F. Dale to dismiss petition.

Oct. 4, 1922. Præcipe for appearance of Richard L. Bigelow, Attorney for Florence F. Dale.

Oct. 7, 1922. Proof of publication.

Oct. 13, 1922. Answer of John M. Shugert to petition of Geo. R. Meek, for rule to dismiss.

Answer of John M. Shugert to petition of Florence F. Dale for rule to dismiss.

Answer of John M. Shugert to petition of Andrew Breeze on motion to quash.

Acceptance of service of copies of answers of John M. Shugert, (3).

Oct. 20, 1922. Petition of Andrew Breeze to set aside service of subpœna and stay proceedings.

Motion of Geo. R. Meek to set aside service of subpœna and stay proceedings, and

Order dated Oct. 3, 1922, fixing hearing thereon Oct. 9th, 1922, at ten o'clock, a. m. and

Order denying the motion to dismiss.

Order denying the motion of Florence F. Dale to dismiss petition.

Petition for the appointment of a receiver.

Oct. 23, 1922. Order setting aside service upon Andrew Breeze and directing that an Alias subpœna be issued returnable Nov. 30, 1922, and if personal service cannot be had the same to be obtained by publication in the Keystone Gazette for two weeks, last publication to be made on or before Nov. 17, 1922.

Oct. 24, 1922. Order appointing Ivan Walker, Esq., of Bellefonte, Pa., Receiver, bond in the sum of $300,000.00 required.

Oct. 30, 1922. Bond of Ivan Walker, Receiver, in the sum of $300,000.00 and order of approval thereon.

Oct. 30, 1922. Alias Subpœna, Petition and schedules, Amended petition and order mailed Andrew Breeze, Downington, Pa., returned marked, "not at Downington."

Nov. 11, 1922. Proof of publication of service by publication on Andrew Breeze.

Nov. 21, 1922. Inventory of Receiver.

Nov. 22, 1922. Order appointing appraisers.

Nov. 29, 1922. Order dated October 9, 1922, allowing withdrawal of appearance of Richard L. Bigelow, counsel for Florence F. Dale.

Dec. 4, 1922. Motion of Andrew Breeze to dismiss petition for adjudication and

Dec. 8, 1922. Order denying motion. Exception noted.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. .

In the Matter of the Centre County Banking Company, a Partnership and John M. Shugert, Individually,
Bankrupts.

DEBTOR'S PETITION.

To the Honorable Charles B. Witmer, Judge of the District Court of the United States for the Middle District of Pennsylvania:

Your petitioner, John M. Shugert, respectfully represents:

1. That he has filed a voluntary petition in bankruptcy for the Centre County Banking Company, a partnership, and for himself individually.

2. That your petitioner is without funds to pay the costs of filing said petition in bankruptcy, and that he cannot obtain the money with which to pay such fees.

Your petitioner therefore prays that he be permitted to proceed *in forma pauperis* as provided by the Act of Congress.

And as in duty bound he will ever pray.

Sworn and subscribed to before me this 29th day of June, A. D. 1922. } JNO. M. SHUGERT.

ELIZABETH C. BARNHART,
(Seal) *Notary Public.*
My commission expires February 19, 1925.

S. D. GETTIG,
Attorney for Petitioner,
Bellefonte, Pa.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. .

In the Matter of the Centre County Banking Company, a Partnership and John M. Shugert, Individually,
Bankrupts.

DEBTOR'S PETITION.

To the Honorable Charles B. Witmer, Judge of the District Court of the United States for the Middle District of Pennsylvania:

The petition of JOHN M. SHUGERT of the Borough of Bellefonte, in the County of Centre, in said district, of the occupation of private banking, respectfully shows:

That your petitioner and George R. Meek, Mary C. Harris, Florence F. Dale, and Andrew Breeze, who survived Lavinia Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, which partnership has had its principal place of business at the Borough of Bellefonte, in the County of Centre, in said district, for the greater portion of the six months immediately preceding the filing of this petition; and that said partnership is insolvent and owes debts in excess of one thousand dollars ($1000). That the said Lavinia Catherine Harris died on or about the tenth day of January, A. D. 1921, and her estate will be administered by the Orphans' Court of Centre County upon the filing of the account of John Blanchard and Sarah C. Brown, her executors.

That such partnership and your petitioner are willing to surrender its and his property for the bene-

fit of its and his creditors, respectively, except such as is exempt by law, and desire to obtain the benefits of the bankruptcy law of 1898, as amended.

That the said George R. Meek, whose residence is in the Borough of Bellefonte, in the County of Centre, in the Middle District of Pennsylvania, Mary C. Harris, whose residence is in the said borough and county, in said district, Florence F. Dale, whose residence is in the City of Hazleton, County of Luzerne, in the Middle District of Pennsylvania, and Andrew Breeze, whose residence is in the Borough of Dowingtown, County of Chester, in the Eastern District of Pennsylvania, have not offered to join in said petition nor is your petitioner informed of their intention in said matter; that said parties are neither wage earners nor persons engaged chiefly in farming or the tillage of the soil, and as individuals owe debts which they are unable to pay in full.

That the schedule hereto annnexed marked A, and verified by your petitioner's oath, contains a full and true statement of all the debts of said partnership, and (so far as it is possible to ascertain) the names and residences of its creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked B, and verified by your petitioner's oath, contains an accurate inventory of all of the property of said partnership, both real and personal, and such further statements concerning said property as are required by said law.

That the schedule hereto annexed marked C, and verified by the oath of your petitioner contains a full and true statement of all of his individual debts, and (so far as it is possible to ascertain) the names and places of residence of his individual creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked D, and verified by the oath of your petitioner contains an accurate inventory of all of his individual property, both real and personal, and such further statements concerning said property as is required by said law.

Wherefore, your petitioner prays that such partnership and your petitioner as an individual and surviving partner of Lavinia Catherine Harris, deceased, may be adjudged bankrupt within the purview of such bankruptcy law of 1898, as amended, and that service of this petition with a subpœna be made upon George R. Meek, Mary C. Harris, Florence F. Dale, and Andrew Breeze, such non-consenting partners, and that proceedings be had as are provided in said law and General Order VIII of the Supreme Court and as the Court may order.

JNO. M. SHUGERT,
Petitioner.

S. D. GETTIG,
Attorney for Petitioner,
Bellefonte, Pa.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

I, JOHN M. SHUGERT, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

Sworn and subscribed to before me this 29th day of June, 1922.

JNO. M. SHUGERT,
Petitioner.

ELIZABETH C. BARNHART,
(Seal) *Notary Public.*
My commission expires February 19, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of Centre County Banking Company, a Partnership, and John M. Shugert, Individually, Against Whom a Petition for Adjudication in Bankruptcy Has Been Filed.

SUBPŒNA TO ALLEGED BANKRUPT.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

To George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, in said District,

GREETING:

For certain causes offered before the District Court of the United States of America within and for the Middle District of Pennsylvania, as a Court of Bankruptcy.

WE COMMAND AND STRICTLY ENJOIN YOU laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court, to be holden at Scranton, in said district, on the twenty-sixth day of July, A. D. 1922, to answer a petition filed by John M. Shugert in our said court praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

WITNESS, the HONORABLE CHARLES B. WITMER, Judge of the said court, and the seal (Seal) thereof, at Scranton this eleventh day of July, A. D. 1922.

G. C. SCHEUER,
Clerk.

S. W. HOFFORD,
Deputy Clerk.

Now, to wit, July 17, 1922, served the within subpœna upon the within named George R. Meek and Mary C. Harris, personally and individually, by reading to and making known to each of them the contents of said writ and by handing to and leaving with George R. Meek and Mary C. Harris, personally and individually, a true and attested copy of the within writ, together with a copy of debtor's petition. Service was made upon Mary C. Harris at her home, East Linn Street, Bellefonte, County of Centre, and within the Middle District of Pennsylvania. Service was made upon George R. Meek in Fishing Creek Valley, County of Clinton, and within the Middle District of Pennsylvania.

So answers

JOHN H. GLASS,
U. S. Marshal.
By A. J. HERR,
Deputy U. S. Marshal.

MARSHAL'S RETURN.

Now, to wit, July 24, A. D. 1922, served the within subpœna on the within named Florence F. Dale, personally by reading to and making known the contents thereof and by leaving a true and attested copy of debtor's petition, with the said Florence F. Dale. Service was made in the City of Hazleton, County of Luzerne, and within the Middle District of Pennsylvania.

So answers

JOHN H. GLASS,
U. S. Marshal.
By GEORGE GREEN,
Deputy U. S. Marshal.

Now, to wit July 26, A. D. 1922, returned N. E. I. as to Andrew Breeze, who is not a resident of the Middle District of Pennsylvania.

So answers

JOHN H. GLASS,
U. S. Marshal.
By GEORGE GREEN,
Deputy U. S. Marshal.

Came to hand 2 o'clock P. M., Marshal's Docket No. 3379. P472-5.

JOHN H. GLASS,
U. S. Marshal.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership and John M. Shugert, Individually,
Bankrupts.

ANSWER OF GEORGE R. MEEK.
(Filed July 27, 1922.)

To the Honorable Charles B. Witmer, Judge of the District Court of the United States, for the Middle District of Pennsylvania:

In answer to the subpœna issued out of your Honorable Court and served upon George R. Meek the seventeenth day of July, 1922, the affiant, the said George R. Meek, would respectfully represent: That at the time the above-named John M. Shugert presented his petition in bankruptcy on behalf of the Centre County Banking Company, a partnership, and John M. Shugert, individually, and for a long time to wit, fifteen months and upwards prior to the date of the petition just above referred to, he, the said George R. Meek, was not a partner—nor had he the said George R. Meek any interest in the partnership known as the Centre County Banking Company.

That the averment in the said petition of John M. Shugert that the affiant, George R. Meek, was a co-partner in the partnership of the Centre County Banking Company is not true in fact.

That the said John M. Shugert had no right, power or authority in law either as a partner or in any other relationship to affect George R. Meek or bring him within the jurisdiction of your Honorable Court.

Your petitioner, the affiant, therefore prays your Honorable Court to make a decree in the premises that the affiant your petitioner, George R. Meek aforesaid, be found to be not a member of the partnership of the Centre County Banking Company, and for such reason not properly brought within the jurisdiction of your Honorable Court.

And he will ever pray, etc.

GEO. R. MEEK.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF CENTRE, } *ss.:*

Before me, a notary public in and for the said State and county, personally came George R. Meek, the above-named petitioning respondent, who being duly sworn according to law says that the facts set forth in the aforegoing answer are true and correct, and further saith not.

Sworn and subscribed to before me this 21st day of day of July, A. D. 1922. } GEO. R. MEEK.

BELLE WEAVER,
(Seal) *Notary Public.*

My commission expires February 19, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of Centre County Banking Company, a Partnership, and John M. Shugert, Individually, Against Whom a Petition for Adjudication in Bankruptcy Has Been Filed.

ANSWER TO PETITION OF CENTRE COUNTY BANKING COMPANY, BY FLORENCE F. DALE.

(Filed July 29, 1922.)

STATE OF PENNSYLVANIA, COUNTY OF LUZERNE, } *ss.:*

Personally appeared before me a notary public in and for the above-named State and county, Florence F. Dale, who being duly sworn according to law, doth depose and say:

1. That she is a resident of the City of Hazleton, County of Luzerne, and State of Pennsylvania, residing therein at No. 527 North James Street;

2. That she is not now, and never was, with her consent, or within her knowledge, a member of, or a partner in, the above-named Centre County Banking Company;

3. That she knows nothing about the affairs of said Centre County Banking Company and has never in any way, manner or form, been consulted about its affairs, and further saith not.

Sworn and subscribed before me this 28th day of July, A. D. 1922. } FLORENCE F. DALE.

JANE M. GORMAN,
(Seal) *Notary Public.*
Commission expires February 11, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,
Bankrupts.

PETITION OF GEORGE R. MEEK.
(Filed August 23, 1922.)

To the Honorable Charles B. Witmer, District Judge:

The petition of George R. Meek respectfully represents:

1. That a voluntary petition in bankruptcy executed by John M. Shugert, was filed in your Honorable Court on the day of July, 1922, as appears by the record in No. 4268 in the bankruptcy docket, in which petition it is set forth by the said John M. Shugert that he and the said George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze are partners, doing business under the style or name of Centre County Banking Company, which partnership has its principal place of business in the Borough of Bellefonte, in said district. It is further set forth in said petition that said partnership is willing to surrender its property for the benefit of its creditors, and that the said John M. Shugert, individually, is willing to surrender his property for the benefit of his creditors, and that the said partnership is insolvent.

2. The said John M. Shugert in said petition further prays that the partnership aforesaid and himself as an individual, shall be adjudicated a bankrupt within

the purview of the Bankruptcy Act of 1898 as amended, and further prays that service of his petition, together with a subpœna be made upon the said George R. Meek and other persons mentioned therein as partners as provided in general order No. 8 prescribed by the Supreme Court of the United States.

3. After said petition in bankruptcy was filed, to wit, on the eleventh day of July, 1922, and without any further petition or complaint having been filed against the said George R. Meek, the clerk of said Court issued a subpœna, under the seal of said Court, directed to the said George R. Meek, requiring him to appear and show cause on or before July 26, 1922, why he should not be adjudicated a bankrupt as provided by law, which subpœna was served upon your petitioner, together with a copy of the petition in bankruptcy filed therein.

4. Your petitioner thereafter filed an answer denying that he was a partner as set forth in said petition, and setting forth among other things therein that the said John M. Shugert had no right, power or authority in law as a partner or otherwise to bring him within the jurisdiction of your Honorable Court in said proceeding, and praying the Court to make an order decreeing that respondent had not properly been brought within the jurisdiction of your Honorable Court.

5. Thereafter an order was made by your Honor referring the petition in bankruptcy and the answer of your petitioner to M. Ward Fleming, Esq., as special master, to take the testimony upon the issue raised in said petition and answer concerning the question of fact as to whether the said George R. Meek is or was a partner in the Centre County Banking Company,

with direction to make findings of fact and conclusions of law and report the same to the Court. Pursuant to said order the said special master notified creditors and your petitioner to appear before him at the court house in Bellefonte on the seventeenth day of August, 1922, at 10 o'clock A. M., at which time testimony would be taken in said case.

6. That immediately after the said M. Ward Fleming had announced that he was present for the purpose of proceeding in the case, your petitioner presented a motion and filed the same with him challenging the jurisdiction of the Court as set forth therein, a copy of which said petition is hereto attached and made a part of this petition. Whereupon the said M. Ward Fleming announced that he would forward the said paper to your Honor for consideration and decision and adjourned said hearing until 10 o'clock A. M., August 28, 1922.

7. Your petitioner here again charges that your Honorable Court is without jurisdiction to issue a subpœna directed to your petitioner as was done in this case, requiring him to show cause why he should not be adjudicated a bankrupt upon the petition of the said John M. Shugert, for the reason that the Constitution and laws of the United States provide that your petitioner can only be adjudicated a bankrupt either upon his own voluntary petition or upon the petition of creditors as set forth therein, and your petitioner not having filed any voluntary petition in bankruptcy and no involuntary petition having been filed against him the Court is without jurisdiction to award or issue any subpœna directed against him.

8. Your petitioner further avers that under the Constitution and laws of the United States he is entitled to a trial by jury upon any proceeding at law

brought against him to determine the question whether or not he was a partner of the said John M. Shugert and others in the partnership known as the Centre County Banking Company, and he here asserts his right and demands that in any proceeding brought against him to determine that matter he shall have a trial by jury in a court having competent jurisdiction of his person and the subject matter of said suit, and he denies that the District Court of the United States for the Middle District of Pennsylvania has jurisdiction to hear and determine said question unless an action shall be brought against him by a citizen and resident of a State other than Pennsylvania or be brought for some cause or thing mentioned and described in the judicial code of the United States conferring jurisdiction upon the district courts to hear and determine causes.

9. While Congress in the Bankruptcy Act of 1898 as amended and as supplemented by the general orders prescribed by the Supreme Court of the United States may have provided for the issuance of a subpœna to a non-assenting partner to appear and show cause why the partnership should not be adjudicated a bankrupt, nevertheless Congress has not enacted any legislation conferring jurisdiction upon a court of bankruptcy to hear and determine by reference to a special master or otherwise an issue of fact as to whether a person named as a partner in a voluntary petition in bankruptcy filed by a person who admits he is a partner but where the allegation of partnership is denied by the person to whom a subpœna has been issued under the provisions of general order No. 8, prescribed by the Supreme Court of the United States and the provisions of the Bankruptcy Act of 1898 as amended and your petitioner avers that since by his answer in said proceed-

ing he has denied that he is or was a partner in the Centre County Banking Company at the time said petition in bankruptcy was filed, your Honorable Court is without jurisdiction to proceed further in said case against this petitioner or to hear and determine the question of fact as to whether he is or was a partner in the Centre County Banking Company upon the petition of the said John M. Shugert.

10. Your petitioner avers that in any proceeding brought in any court against him to determine the question of whether he is or was a partner in the Centre County Banking Company, jurisdiction can only be acquired by a summons or subpœna duly issued out of said court of competent jurisdiction, duly served upon the respondent and a cause of action set forth therein by a person, firm or corporation competent to sue, and no such proceeding having been brought against respondent of which your Honorable Court has jurisdiction, this Court should grant the prayer of the petitioner in this case and quash the subpœna issued against him.

Wherefore, your petitioner prays that a rule may be granted directing the said John M. Shugert, or any other party in interest, to appear and show cause why the subpœna in bankruptcy issued against your petitioner in said case should not be quashed and set aside, and an order be made setting aside the order of reference heretofore made to M. Ward Fleming as special master in said case, and for such other order or decree as to right and justice shall appertain.

GEO. R. MEEK.

MIDDLE DISTRICT OF PENNSYLVANIA, CENTRE COUNTY, } *ss.:*

George R. Meek, the petitioner above named, does hereby make solemn oath that the facts set forth in the foregoing petition are true.

Subscribed and sworn to before me this 17th day of August, 1922. } GEO. R. MEEK.

BELLE WEAVER,
(Seal) *Notary Public.*

My commission expires February 19, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership and John M. Shugert, Individually,

Bankrupts.

To M. Ward Fleming, Referee in Bankruptcy:

George R. Meek, by his counsel, Ellis L. Orvis, Harry Keller and M. C. Rhone, appear specially, and for the purpose only of filing this paper, before you this day, pursuant to notice dated August 3, 1922, that a hearing would be held before you in the above stated case pursuant to an order of reference made by the Honorable Charles B. Witmer, District Judge, which hearing is stated in said notice to be for the purpose of taking testimony upon an issue raised by petition and answer, upon which testimony you are to make a report to the Court, together with findings of fact and conclusions of law, and respectfully suggest:

1. That the District Court of the United States for the Middle District of Pennsylvania as set forth in the answer filed by the said George R. Meek has no jurisdiction, right, power, or authority to issue a subpœna directed to the said George R. Meek to show cause why he should not be adjudicated a bankrupt upon the voluntary petition filed by John M. Shugert, as set forth in a subpœna issued in this case, which said subpœna is hereto attached and made a part hereof.

2. The District Court of the United States for the Middle District of Pennsylvania is without jurisdiction to make any order of reference or to confer upon you as special master or otherwise, power and authority to take testimony and make a report to the Court, together with findings of fact and conclusions of law for the purpose of hearing or determining the question of whether the said George R. Meek is or was a partner of the said John M. Shugert, and said Court is without jurisdiction to issue any process directed to the said George R. Meek upon the petition in bankruptcy filed by the said John M. Shugert.

3. In any proceeding to determine the question of whether the said George R. Meek is or was a partner of the said John M. Shugert, the said George R. Meek is entitled under the Constitution and the laws of the United States to a trial by jury and he and now asserts this right and privilege conferred upon him by the Constitution and laws of the United States as a citizen thereof and denies the jurisdiction of the Court to proceed against him otherwise than by summons duly issued out of said Court, or by a subpœna founded upon a bill in equity duly filed in said court by a creditor or other claimant in a plenary proceeding.

4. There is no power or authority conferred upon the District Court of the United States for the Middle District of Pennsylvania to order or direct a subpœna in bankruptcy to be issued against the said George R. Meek founded upon a voluntary petition in bankruptcy filed by John M. Shugert, in which it is alleged that the said George R. Meek is a partner with him in the Centre County Banking Company.

5. There is no power, authority or jurisdiction conferred upon the District Court of the United States

for the Middle District of Pennsylvania to adjudicate the said George R. Meek a bankrupt upon the voluntary petition in bankruptcy of John M. Shugert, for the reason that under the Constitution and laws of the United States the said George R. Meek can only be adjudicated a bankrupt upon the petition of three or more creditors having provable debts against him amounting to five hundred dollars and alleging that the said George R. Meek owes debts in the sum of at least one thousand dollars and has committed one of the acts of bankruptcy set forth in the Bankruptcy Act of 1898 and the supplements thereto, or said petition allege that the creditors of the said George R. Meek were less than twelve in number, whereupon at least one creditor is required to file such petition unless the said George R. Meek himself shall file a voluntary petition therein, and the said George R. Meek not having filed any voluntary petition in bankruptcy in said court and no creditor having filed an involuntary petition in bankruptcy against him in said court, said Court is and was without jurisdiction to issue the subpœna issued in this case and without power or authority to make any order therein, except to quash the subpœna, and a motion is already prepared and will be presented by the said George R. Meek to the Judge of said court on Friday, August 18th, or as soon thereafter as counsel can be heard by said Judge.

6. The said M. Ward Fleming and the District Court of the United States are for other reasons without jurisdiction to hear and determine any of the matters and things mentioned or referred to in the notice above mentioned, or to hear and determine any of the things referred to in the subpœna issued in this case for other reasons which will be presented to the said Court.

Wherefore, counsel for the said George R. Meek, do present this their motion to you and respectfully suggest that the same be forwarded to the Hon. C. B. Witmer, District Judge for his consideration, and that no further proceedings be had before you until the question of jurisdiction raised in this paper shall be disposed of by the Court.

Respectfully submitted,

(Sgd.) ELLIS L. ORVIS,
HARRY KELLER,
M. C. RHONE.

August 22, 1922, rule granted as prayed for, returnable August 28, 1922, at 10 o'clock A. M., at Sunbury, Pennsylvania.

CHARLES B. WITMER,
District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, Surviving Partners of Lavina Catherine Harris, Deceased, Individually, and Trading as Centre County Banking Company,

Bankrupts.

ANSWER

OF JOHN M. SHUGERT TO PETITION OF GEORGE R. MEEK FOR RULE TO DISMISS THE PETITION IN BANKRUPTCY AND SET ASIDE THE SUBPŒNA ISSUED AGAINST HIM.

(Filed October 13, 1922.)

To the Honorable Charles B. Witmer, Judge of the District Court of the United States, for the Middle District of Pennsylvania:

The answer of John M. Shugert to the petition for a rule in the above stated case, respectfully represents:

First.—That it is not true, as set forth in paragraph one of the petition of the said George R. Meek, that your Honorable Court has no jurisdiction, right, power or authority to issue a subpœna in bankruptcy upon the voluntary petition filed by myself, but said Court has jurisdiction of said cause of action to require the said George R. Meek to show cause why he should not be declared a bankrupt, as a partner in the Centre County Banking Company.

Second.—That it is not true, as set forth in paragraph two of the petition of the said George R. Meek, that the said Court is without jurisdiction, right, power or authority to adjudicate him a bankrupt, upon the petition filed by me as amended.

Third.—That it is not true, as set forth in paragraph three of the petition of the said George R. Meek, that only an involuntary proceeding in bankruptcy can be instituted and maintained against him by the required number of creditors setting forth one or more acts of bankruptcy, neither is it true that the said Court is without jurisdiction to hear and determine the question of solvency or insolvency of the said George R. Meek or to adjudicate him a bankrupt upon the voluntary petition as amended, filed by me. Respondent further avers that it is not necessary nor mandatory under the Bankruptcy Act of 1898, and its amendments, that, where a voluntary petition is filed by one member of a partnership, on behalf of the said partnership, and the other members not joining, an act of bankruptcy should be alleged as to such non-joining members.

Fourth.—In answer to paragraph four of the petition of the said George R. Meek, this respondent avers that your Honorable Court on the fifteenth day of September, 1922, allowed the application to amend the original petition filed by me, which said amended petition, *inter alia*, prays that all members of said partnership be adjudged bankrupts, and that by the same order the subpœna theretofore issued was quashed by the said Court and a new subpœna directed to be issued in accordance with the amended petition. That said proceedings, after said amendment and the quashing of said subpœna, are proceedings *de novo*, as upon the original petition. That notice was ac-

cepted of the application to amend said petition, prior to the time that the same was filed in said Court, by counsel for the said George R. Meek, and no answer filed or objection made thereto.

Fifth.—Your respondent avers that the allegations contained in paragraph five of the petition of the said George R. Meek are not true, but that the business of said copartnership was continued after the death of Lavina Catherine Harris, evidently referred to in said paragraph, until the time that the business was suspended on May 13, 1922. That the said Court has ample authority, jurisdiction and power under the Bankruptcy Act of 1898, and its amendments to declare the surviving partners bankrupts.

Sixth.—That it is not true, as set forth in paragraph six of the petition of the said George R. Meek, that neither the Bankruptcy Act of 1898, nor any other law of the United States, confers power or authority upon one partner to file a petition in bankruptcy in the partnership name, for the purpose of having the partnership declared a bankrupt, where one or more of the remaning partners do not assent or consent thereto. Respondent avers that the said Bankruptcy Act does authorize a petition in bankruptcy to be filed by one partner, where all do not consent to join on behalf of the partnership and the individual members thereof, and that under the Bankruptcy Act, above referred to, and its amendments, the said Court is authorized to declare all of the members of such partnership, as well as the partnership itself, bankrupts.

Seventh.—Your respondent avers that the allegations set forth in paragraph seven of the petition of the said George R. Meek, are not true, but that General

Order Number Eight of the Supreme Court of the United States is an order defining the method of procedure in bankruptcy, duly promulgated by said Court under the powers conferred upon it, by the Bankruptcy Act of 1898 and its amendments, and is not in violation of the Constitution of the United States, and is not a denial of the equal protection of the laws of the United States, nor of the taking of property without due process of law. Respondent further avers that said order has the effect of law and is not in violation of any constitutional right, but provides a method for carrying into effect the said Bankruptcy Act.

Eighth.—That the allegations set forth in paragraph eight of the petition of the said George R. Meek are not true, but the said Court, as respondent is informed, has ample jurisdiction to declare all partners bankrupts upon the petition of one or more partners.

Ninth.—That the allegations set forth in paragraph nine do not apply to the copartnership of the Centre County Banking Company, and that it is not true that after the death of one partner, there was a dissolution as to the others, but that said partnership continued business until they were financially unable to do so any longer and were compelled to close their doors for the purpose of a settlement of said partnership affairs, as authorized by the Bankruptcy Act.

Tenth.—That your respondent denies the allegations of paragraph ten of the petition of the said George R. Meek, but avers that under the amended petition filed the said Court has ample jurisdiction to adjudicate the said George R. Meek, as well as all other surviving partners of the Centre County Banking Company, bankrupts.

WHEREFORE, this respondent prays your Honorable Court that the motion to dismiss the petition in bankruptcy, made by the said George R. Meek, and to set aside the subpœna issued under said amended petition, be dismissed at his costs.

JNO. M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY OF CENTRE, } *ss.:*

Before me, the undersigned, a notary public in and for said State and county, personally appeared JOHN M. SHUGERT, above named, who being duly sworn according to law, doth depose and say that the facts set forth in the foregoing answer are true and correct to the best of his knowledge, information and belief.

Sworn and subscribed before me this 12th day of October, A. D. 1922. } JNO. M. SHUGERT.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*

My commission expires March 6, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually, Bankrupts.

PETITION OF FLORENCE F. DALE.

(Filed August 23, 1922.)

To the Honorable Charles B. Witmer, District Judge:

The petition of Florence F. Dale respectfully represents:

1. That a voluntary petition in bankruptcy executed by John M. Shugert was filed in your Honorable Court on the day of July, 1922, as appears by the record in No. 4268 in the Bankruptcy Docket, in which petition it is set forth by the said John M. Shugert that he and the said Florence F. Dale, Mary C. Harris, George R. Meek and Andrew Breeze are partners, doing business under the style or name of Centre County Banking Company, which partnership has its principal place of business in the Borough of Bellefonte, in said district. It is further set forth in said petition that said partnership is willing to surrender its property for the benefit of its creditors, and that the said John M. Shugert, individually, is willing to surrender his property for the benefit of his creditors, and that the said partnership is insolvent.

2. The said John M. Shugert in said petition further prays that the partnership aforesaid and himself as an individual, shall be adjudicated a bankrupt

within the purview of the Bankruptcy Act of 1898 as amended, and further prays that service of his petition, together with a subpœna be made upon the said Florence F. Dale and other persons mentioned therein as partners as provided in General Order No. 8 prescribed by the Supreme Court of the United States.

3. After said petition in bankruptcy was filed, to wit, on the eleventh day of July, 1922, and without any further petition or complaint having been filed against the said Florence F. Dale, the clerk of said court issued a subpœna, under the seal of said court, directed to the said Florence F. Dale, requiring her to appear and show cause on or before July 26, 1922, why she should not be adjudicated a bankrupt as provided by law, which subpœna was served upon your petitioner, together with a copy of the petition in bankruptcy filed therein.

4. Your petitioner thereafter filed an answer denying that she was a partner as set forth in said petition, and setting forth among other things therein that the said John M. Shugert had no right, power or authority in law as a partner or otherwise to bring her within the jurisdiction of your Honorable Court in said proceeding, and praying the Court to make an order decreeing that respondent had not properly been brought within the jurisdiction of your Honorable Court.

5. Thereafter an order was made by your Honor referring the petition in bankruptcy and the answer of your petitioner to M. Ward Fleming, Esq., as special master, to take the testimony upon the issue raised in said petition and answer concerning the question of fact as to whether the said Florence F. Dale is or was a partner in the Centre County Banking Company,

with direction to make findings of fact and conclusions of law and report the same to the Court. Pursuant to said order the said special master notified creditors and your petitioner to appear before him at the Court House in Bellefonte on the seventeenth day of August, 1922, at 10 o'clock A. M., at which time testimony would be taken in said case.

6. That immediately after the said M. Ward Fleming had announced that he was present for the purpose of proceeding in the case, your petitioner presented a motion and filed the same with him challenging the jurisdiction of the Court as set forth therein, a copy of which petition is hereto attached and made a part of this petition. Whereupon the said M. Ward Fleming announced that he would forward the said paper to your Honor for consideration and decision and adjourned said hearing until 10 o'clock A. M., August 28, 1922.

7. Your petitioner here again charges that your Honorable Court is without jurisdiction to issue a subpœna directed to your petitioner as was done in this case, requiring her to show cause why she should not be adjudicated a bankrupt upon the petition of the said John M. Shugert, for the reason that the Constitution and laws of the United States provide that your petitioner can only be adjudicated a bankrupt either upon her own voluntary petition or upon the petition of creditors as set forth therein, and your petitioner not having filed any voluntary petition in bankruptcy and no involuntary petition having been filed against her the Court is without jurisdiction to award or issue any subpœna directed against her.

8. Your petitioner further avers that under the Constitution and laws of the United States she is entitled to a trial by jury upon any proceeding at law

brought against her to determine the question whether or not she was a partner of the said John M. Shugert and others in the partnership known as the Centre County Banking Company, and she here asserts her right and demands that in any proceeding brought against her to determine that matter she shall have a trial by jury in a court having competent jurisdiction of her person and the subject matter of said suit, and she denies that the District Court of the United States for the Middle District of Pennsylvania has jurisdiction to hear and determine said question unless an action shall be brought against her by a citizen and resident of a State other than Pennsylvania or be brought for some cause or thing mentioned and described in the judicial code of the United States conferring jurisdiction upon the district courts to hear and determine causes.

9. While Congress in the Bankruptcy Act of 1898 as amended and as supplemented by the general orders prescribed by the Supreme Court of the United States may have provided for the issuance of a subpœna to a non-assenting partner to appear and show cause why the partnership should not be adjudicated a bankrupt, nevertheless Congress has not enacted any legislation conferring jurisdiction upon a court of bankruptcy to hear and determine by reference to a special master or otherwise an issue of fact as to whether a person named as a partner in a voluntary petition in bankruptcy filed by a person who admits he is a partner but where the allegation of partnership is denied by the person to whom a subpœna has been issued under the provisions of General Order No. 8 prescribed by the Supreme Court of the United States and the provisions of the Bankruptcy Act of 1898 as amended; and your petitioner avers that since by her answer

in said proceeding she has denied that she is or was a partner in the Centre County Banking Company at the time said petition in bankruptcy was filed your Honorable Court is without jurisdiction to proceed further in said case against this petitioner or to hear and determine the question of fact as to whether she is or was a partner in the Centre County Banking Company upon the petition of the said John M. Shugert.

10. Your petitioner avers that in any proceeding brought in any court against her to determine the question of whether she is or was a partner in the Centre County Banking Company, jurisdiction can only be acquired by a summons or subpœna duly issued out of a court of competent jurisdiction, duly served upon the respondent and a cause of action set forth therein by a person, firm, or corporation competent to sue, and no such proceeding having been brought against respondent of which your Honorable Court has jurisdiction, this Court should grant the prayer of the petitioner in this case and quash the subpœna issued against her.

Wherefore, your petitioner prays that a rule may be granted directing the said John M. Shugert, or any other party in interest, to appear and show cause why the subpœna in bankruptcy issued against your petitioner in said case should not be quashed and set aside, and an order be made setting aside the order of reference heretofore made to M. Ward Fleming as special master in said case, and for such other order or decree as to right and justice shall appertain.

FLORENCE F. DALE,
By R. L. BIGELOW,
M. C. RHONE,
ELLIS L. ORVIS,
Her Counsel.

MIDDLE DISTRICT OF PENNSYLVANIA,
CENTRE COUNTY, } *ss.:*

Ellis L. Orvis, counsel for petitioner above named, being duly affirmed according to law, says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

Affirmed and subscribed to before me this seventeenth day of August, 1922. } ELLIS L. ORVIS.

BELLE WEAVER,
(Seal) *Notary Public.*

My commission expires February 19, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,

Bankrupts.

To M. Ward Fleming, Referee in Bankruptcy:

Florence F. Dale, by her counsel, R. L. Bigelow, M. C. Rhone and Ellis L. Orvis, appear specially, and for the purpose only of filing this paper, before you this day, pursuant to notice dated August 3, 1922, that a hearing would be held before you in the above-stated case pursuant to an order of reference made by the Hon. Charles B. Witmer, District Judge, which hearing is stated in said notice to be for the purpose of taking testimony upon an issue raised by petition and answer, upon which testimony you are to make a report to the Court, together with findings of fact and conclusions of law, and respectfully suggest:

1. That the District Court of the United States for the Middle District of Pennsylvania as set forth in the answer filed by the said Florence F. Dale has no jurisdiction, right, power, or authority to issue a subpœna directed to the said Florence F. Dale to show cause why she should not be adjudicated a bankrupt upon the voluntary petition filed by John M. Shugert, as set forth in a subpœna issued in this case, which said subpœna is hereto attached and made a part hereof.

2. The District Court of the United States for the Middle District of Pennsylvania is without jurisdiction to make any order of reference or to confer

upon you as special master or otherwise, power and authority to take testimony and make a report to the Court, together with findings of fact and conclusions of law for the purpose of hearing or determining the question of whether the said Florence F. Dale is or was a partner of the said John M. Shugert, and said Court is without jurisdiction to issue any process directed to the said Florence F. Dale upon the petition in bankruptcy filed by the said John M. Shugert.

3. In any proceeding to determine the question of whether the said Florence F. Dale is or was a partner of the said John M. Shugert, the said Florence F. Dale is entitled under the Constitution and the laws of the United States to a trial by jury and she and now asserts this right and privilege conferred upon her by the Constitution and laws of the United States as a citizen thereof and denies the jurisdiction of the Court to proceed against her otherwise than by summons duly issued out of said court, or by a subpœna founded upon a bill in equity duly filed in said court by a creditor or other claimant in a plenary proceeding.

4. There is no power or authority conferred upon the District Court of the United States for the Middle District of Pennsylvania to order or direct a subpœna in bankruptcy to be issued against the said Florence F. Dale founded upon a voluntary petition in bankruptcy filed by John M. Shugert, in which it is alleged that the said Florence F. Dale is a partner with him in the Centre County Banking Company.

5. There is no power, authority or jurisdiction conferred upon the District Court of the United States for the Middle District of Pennsylvania to adjudicate the said Florence F. Dale a bankrupt upon the voluntary petition in bankruptcy of John M. Shugert, for

the reason that under the Constitution and laws of the United States the said Florence F. Dale can only be adjudicated a bankrupt upon the petition of three or more creditors having provable debts against her amounting to five hundred dollars and alleging that the said Florence F. Dale owes debts in the sum of at least one thousand dollars and has committed one of the acts of bankruptcy set forth in the Bankruptcy Act of 1898 and the supplements thereto, or said petition allege that the creditors of the said Florence F. Dale were less than twelve in number, whereupon at least one creditor is required to file such petition unless the said Florence F. Dale herself shall file a voluntary petition therein, and the said Florence F. Dale not having filed any voluntary petition in bankruptcy in said court and no creditor having filed an involuntary petition in bankruptcy against her in said court, said Court is and was without jurisdiction to issue the subpœna issued in this case and without power or authority to make any order therein, except to quash the subpœna, and a motion is already prepared and will be presented by the said Florence F. Dale to the Judge of said court on Friday, August 18th, or as soon thereafter as counsel can be heard by said Judge.

6. The said M. Ward Fleming and the District Court of the United States are for other reasons without jurisdiction to hear and determine any of the matters and things mentioned or referred to in the notice above mentioned, or to hear and determine any of the things referred to in the subpœna issued in this case for other reasons which will be presented to the said Court.

Wherefore, counsel for the said Florence F. Dale do present this their motion to you and respectfully

suggest that the same be forwarded to the Hon. C. B. Witmer, District Judge, for his consideration, and that no further proceedings be had before you until the question of jurisdiction raised in this paper shall be disposed of by the Court.

Respectfully submitted,

(Signed) R. L. BIGELOW,
M. C. RHONE,
ELLIS L. ORVIS.

August 22, 1922, rule granted as prayed for, returnable at Sunbury, Pennsylvania, Monday, August 28th, at 10 o'clock A. M.

CHARLES B. WITMER,
District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, Surviving Partners of Lavina Catherine Harris, Deceased, Individually, and Trading as Centre County Banking Company,

Bankrupts.

ANSWER

OF JOHN M. SHUGERT TO PETITION OF FLORENCE F. DALE FOR RULE TO DISMISS THE PETITION IN BANKRUPTCY AND SET ASIDE THE SUBPŒNA ISSUED AGAINST HER.

(Filed October 13, 1922.)

To the Honorable Charles B. Witmer, Judge of the District Court of the United States, for the Middle District of Pennsylvania:

The answer of JOHN M. SHUGERT to the petition for a rule in the above stated case, respectfully represents:

First.—That it is not true, as set forth in paragraph one of the petition of the said Florence F. Dale, that your Honorable Court has no jurisdiction, right, power or authority to issue a subpœna in bankruptcy upon the voluntary petition filed by myself, but said Court has jurisdiction of said cause of action to require the said Florence F. Dale to show cause why she should not be declared a bankrupt, as a partner in the Centre County Banking Company.

Second.—That it is not true, as set forth in paragraph two of the petition of the said Florence F. Dale, that the said Court is without jurisdiction, right, power or authority to adjudicate her a bankrupt, upon the petition filed by me as amended.

Third.—That it is not true, as set forth in paragraph three of the petition of the said Florence F. Dale, that only an involuntary proceeding in bankruptcy can be instituted and maintained against her by the required number of creditors setting forth one or more acts of bankruptcy, neither is it true that the said Court is without jurisdiction to hear and determine the question of solvency or insolvency of the said Florence F. Dale or to adjudicate her a bankrupt upon the voluntary petition as amended, filed by me. Respondent further avers that it is not necessary nor mandatory under the Bankruptcy Act of 1898 and its amendments, that, where a voluntary petition is filed by one member of a partnership, on behalf of the said partnership, and the other members not joining, an act of bankruptcy should be alleged as to such non-joining members.

Fourth.—In answer to paragraph four of the petition of the said Florence F. Dale, this respondent avers that your Honorable Court on the fifteenth day of September, 1922, allowed the application to amend the original petition filed by me, which said amended petition, *inter alia,* prays that all members of said partnership be adjudged bankrupts, and that by the same order the subpœna theretofore issued was quashed by the said Court and a new subpœna directed to be issued in accordance with the amended petition. That said proceedings, after said amendment and the quashing of said subpœna, are proceedings *de novo,* as upon the original petition. That notice was accepted of the

application to amend said petition, prior to the time that the same was filed in said court, by counsel for the said Florence F. Dale, and no answer filed or objection made thereto.

Fifth.—Your respondent avers that the allegations contained in paragraph five of the petition of the said Florence F. Dale are not true, but that the business of said copartnership was continued after the death of Lavina Catherine Harris, evidently referred to in said paragraph, until the time that the business was suspended on May 13, 1922. That the said Court has ample authority, jurisdiction and power under the Bankruptcy Act of 1898 and its amendments to declare the surviving partners bankrupts.

Sixth.—That it is not true, as set forth in paragraph six of the petition of the said Florence F. Dale, that neither the Bankruptcy Act of 1898, nor any other law of the United States, confers power or authority upon one partner to file a petition in bankruptcy in the partnership name, for the purpose of having the partnership declared a bankrupt, where one or more of the remaining partners do not assent or consent thereto. Respondent avers that the said Bankruptcy Act does authorize a petition in bankruptcy to be filed by one partner, where all do not consent to join on behalf of the partnership and the individual members thereof, and that under the Bankruptcy Act, above referred to, and its amendments, the said Court is authorized to declare all of the members of such partnership, as well as the partnership itself, bankrupts.

Seventh.—Your respondent avers that the allegations set forth in paragraph seven of the petition of the said Florence F. Dale, are not true, but that General Order Number Eight of the Supreme Court of the

United States is an order defining the method of procedure in bankruptcy, duly promulgated by said Court under the powers conferred upon it, by the Bankruptcy Act of 1898 and its amendments, and is not in violation of the Constitution of the United States, and is not a denial of the equal protection of the laws of the United States, nor of the taking of property without due process of law. Respondent further avers that said order has the effect of law and is not in violation of any constitutional right, but provides a method for putting into effect the said Bankruptcy Act.

Eighth.—That the allegations set forth in paragraph eight of the petition of the said Florence F. Dale are not true, but the said Court, as respondent is informed, has ample jurisdiction to declare all partners bankrupt upon the petition of one or more partners.

Ninth.—That the allegations set forth in paragraph nine do not apply to the copartnership of the Centre County Banking Company, and that it is not true that after the death of one partner, there was a dissolution as to the others, but that said partnership continued business until they were financially unable to do so any longer and were compelled to close their doors for the purpose of a settlement of said partnership affairs, as authorized by the Bankruptcy Act.

Tenth.—That your respondent denies the allegations of paragraph ten of the petition of the said Florence F. Dale, but avers that under the amended petition filed the said Court has ample jurisdiction to adjudicate the said Florence F. Dale, as well as all other surviving partners of the Centre County Banking Company, bankrupts.

WHEREFORE, this respondent prays your Honorable Court that the motion to dismiss the petition in bankruptcy, made by the said Florence F. Dale, and to set aside the subpœna issued under said amended petition, be dismissed at her costs.

JNO. M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY OF CENTRE, } *ss.:*

Before me, the undersigned, a notary public in and for said State and county, personally appeared JOHN M. SHUGERT, above named, who being duly sworn according to law, doth depose and say that the facts set forth in the foregoing answer are true and correct to the best of his knowledge, information and belief.

Sworn and subscribed before me this 12th day of October, A. D. 1922. } JNO. M. SHUGERT.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*

My commission expires March 6, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,
Bankrupts.

PETITION TO AMEND.
(Filed August 26, 1922.)

To the Honorable Charles B. Witmer, Judge of the District Court of the United States, for the Middle District of Pennsylvania:

The petition of JOHN M. SHUGERT of the Borough of Bellefonte, County of Centre, in said district, of the occupation of private banking, respectfully shows:

That your petitioner on behalf of himself and the copartnership, doing business as the Centre County Banking Company, sometime the latter part of June, A. D. 1922, filed a petition in bankruptcy in the above stated court, to the number and term, hereinabove set forth. That your petitioner is desirous of amending said petition and the prayer thereof as follows:

FIRST AS TO SAID PETITION:

> "That there has been no final settlement of the partnership business of said partners, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than One Thousand Dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

SECOND AS TO THE PRAYER THEREOF:

"Wherefore, your petitioner prays that such partnership, as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze, and your petitioner, surviving partners of Lavinia Catherine Harris, deceased, may each individually, as well as said firm, he adjudged bankrupt within the purview of such bankruptcy law of 1898, as amended, and that service of this petition with a subpœna, be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings be had as are provided in said law and General Order VIII of the Supreme Court, and as the Court may order."

Your petitioner further represents that his reason for praying the said Court to allow the foregoing amendment is based upon the fact that there is considerable diversity of opinion in the decisions of the Federal Courts as to the practice in filing petitions in bankruptcy, involving a partnership where all of the partners do not join. That your petitioner in the filing of the original petition followed what he believed was the practice in said district, as well as in many other district courts. That some of the decisions of various district courts, as your petitioner has since been informed, seemed to require a statement of facts and prayer, as hereinabove indicated. That your petitioner is advised by counsel that it is necessary that the foregoing amendments should be made to the original petition as filed.

That no previous application has been made for the order hereinafter asked.

WHEREFORE, your petitioner prays for an order amending said petition in the particulars above described, notice of which has been given to Harry Keller and Ellis L. Orvis, attorneys for George R. Meek and

Florence F. Dale, and notice of which is also accepted by S. D. Gettig, as attorney for Mary C. Harris. Your petitioner further prays that notice may be given to Andrew Breeze, as required by law.

Dated at Bellefonte, Pennsylvania, August 22, A. D. 1922.

JNO. M. SHUGERT,
Petitioner.

S. D. GETTIG,
Attorney for Petitioner,
Bellefonte, Pa.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

I, JOHN M. SHUGERT, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. That he is without funds to pay the cost of filing this petition and that he can not obtain the money with which to pay such fees.

Sworn and subscribed before me this 22d day of August, A. D. 1922. } JNO. M. SHUGERT.
Petitioner.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*

My commission expires March 6, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,

Bankrupts.

PETITION TO AMEND PETITION FOR ADJUDICATION AND ACCEPTANCE OF SERVICE THEREON.

(Filed August 28, 1922.)

To Orvis & Zerby and Harry Keller, Attorneys of Record for George R. Meek and Ellis L. Orvis, Attorney for Florence F. Dale:

Please take notice and you are hereby notified that a petition has this day been mailed to the clerk of the District Court of the United States, for the Middle District of Pennsylvania, by John M. Shugert, on behalf of himself and the copartnership, known as the Centre County Banking Company, to amend the original petition and prayer filed by him on behalf of himself and his partners in said banking company, and to which is attached a schedule of the assets and liabilities of said banking company, and of himself, individually, and which said amendment and prayer are as follows, to wit:

AMENDMENT TO PETITION.

"That there has been no final settlement of the partnership business of said partners, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than One

Thousand Dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

PRAYER TO PETITION.

"Wherefore, your petitioner prays that such partnership, as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze, and your petitioner, surviving partners of Lavinia Catherine Harris, deceased, may each individually, as well as said firm, be adjudged bankrupt within the purview of such bankruptcy law of 1898, as amended, and that service of this petition, with a subpœna, be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings be had as are provided in said law and General Order VIII of the Supreme Court, and as the Court may order."

S. D. GETTIG,
Attorney for Petitioner.

August 22, 1922, I hereby accept notice of the above recited petition and waive further service thereof.

ELLIS L. ORVIS,
Attorney for Geo. R. Meek and Florence F. Dale.

HARRY KELLER,
Attorney for Geo. R. Meek.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, Surviving Partners of Lavina Catherine Harris, Deceased, Individually, and Trading as Centre County Banking Company,

Bankrupts.

ACCEPTANCE OF SERVICE.
(Filed October 13, 1922.)

And now, to wit, October 12, A. D. 1922, I hereby accept notice for George R. Meek of the filing of an answer to the petition of the said Meek for motion to dismiss the petition in bankruptcy filed in the above stated case, and set aside the subpœna issued in pursuance thereof.

HARRY KELLER,
M. C. RHONE,
ELLIS L. ORVIS,
Attorneys for George R. Meek.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, Surviving Partners of Lavina Catherine Harris, Deceased, Individually, and Trading as Centre County Banking Company,

Bankrupts.

ACCEPTANCE OF SERVICE.

(Filed October 13, 1922.)

And now, to wit, October 12, A. D. 1922, I hereby accept notice for Florence F. Dale of the filing of an answer to the petition of the said Dale for motion to dismiss the petition in bankruptcy filed in the above stated case, and set aside the subpœna issued in pursuance thereof.

M. C. RHONE,
R. L. BIGELOW,
ELLIS L. ORVIS,
Attorneys for Florence F. Dale.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, an Individual,

Bankrupts.

S. D. GETTIG, ESQ., Bellefonte, Penna., for John M. Shugert and Mary C. Harris;

N. B. SPANGLER, ESQ., Bellefonte, Penna., for Depositors' Committee;

RICHARD L. BIGELOW, ESQ., Hazleton, Penna., for Florence F. Dale;

HON. E. L. ORVIS, HARRY KELLER, ESQ., M. C. RHONE, ESQ., Bellefonte, Penna., for the rule.

ORDER.

(Filed September 18, 1922.)

September 15, 1922, after argument on the showing made and on due consideration, the Court being satisfied that the subpœna issued was not in conformity with the initial petition filed, the subpœna is quashed.

The amendment of the original petition as now presented is allowed and the clerk is directed to issue a subpœna as prayed for in the petition as amended.

Service of subpœna to be made on Andrew Breeze, if personal service cannot be obtained on him, by publishing this order together with such subpœna in the *Keystone Gazette*, a newspaper published at Bellefonte, in said district, for two consecutive weeks; the last of

said publications to be made on or before the tenth day of October, 1922, and by mailing copy of this order and subpœna, to the last place of abode of Andrew Breeze, to wit: Downingtown, Pennsylvania, in the Eastern District of Pennsylvania, on or before the date of the first publication.

By THE COURT,
CHARLES B. WITMER,
U. S. District Judge.

P. S.—The first paragraph may be omitted from adv.

C. B. W.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,

Bankrupts.

AMENDED PETITION IN BANKRUPTCY.

(Filed August 26, 1922.)

To the Honorable Charles B. Witmer, Judge of the District Court of the United States for the Middle District of Pennsylvania:

The petition of John M. Shugert, of the Borough of Bellefonte, in the County of Centre, in said district, of the occupation of private banking, respectfully shows:

That your petitioner and George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, who survived Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, which partnership has had its principal place of business at the Borough of Bellefonte in the County of Centre, in said district, for the greater portion of the six months immediately preceding the filing of this petition; and that said partnership is insolvent and owes debts in excess of one thousand dollars ($1000). That the said Lavina Catherine Harris died on or about the tenth day of January, A. D. 1921, and her estate will be administered by the Orphans' Court of Centre County upon the filing of the account of John Blanchard and Sarah C. Brown, her executors.

That such partnership and your petitioner are willing to surrender its and his property for the benefit of its and his creditors, respectively, except such as is exempt by law, and desire to obtain the benefits of the bankruptcy law of 1898, as amended.

That the said George R. Meek, whose residence is in the Borough of Bellefonte, in the County of Centre, in the Middle District of Pennsylvania, Mary C. Harris, whose residence is in the said borough and county, in said district; Florence F. Dale, whose residence is in the City of Hazleton, County of Luzerne, in the Middle District of Pennsylvania, and Andrew Breeze, whose residence is in the Borough of Downingtown, County of Chester, in the Eastern District of Pennsylvania, have not offered to join in said petition nor is your petitioner informed of their intention in said matter; that said parties are neither wage earners nor persons engaged chiefly in farming or the tillage of the soil, and as individuals owe debts which they are unable to pay in full.

That there has been no final settlement of the partnership business of said partners, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than one thousand dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts.

That the schedule hereto annexed marked A, and verified by your petitioner's oath, contains a full and true statement of all the debts of said partnership, and (so far as it is possible to ascertain) the names and residences of its creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked B, and verified by your petitioner's oath, contains an accurate inventory of all of the property of said partnership,

both real and personal, and such further statements concerning said property as are required by said law.

That the schedule hereto annexed marked C, and verified by the oath of your petitioner contains a full and true statement of all of his individual debts, and (so far as it is possible to ascertain) the names and places of residence of his individual creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked D, and verified by the oath of your petitioner contains an accurate inventory of all of his individual property, both real and personal, and such further statements concerning said property as is required by said law.

WHEREFORE, your petitioner prays that such partnership as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze, and your petitioner, surviving partners of Lavina Catherine Harris, deceased, may each individually, as well as said firm, be adjudged bankrupt within the purview of such bankruptcy law of 1898, as amended, and that service of this petition, with a subpœna, be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings be had as are provided in said law and General Order VIII of the Supreme Court, and as the Court may order.

JNO. M. SHUGERT,
Petitioner.

S. D. GETTIG,
Attorney for Petitioner,
Bellefonte, Pa.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

I, JOHN M. SHUGERT, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. That he is without funds to pay the cost of filing this petition and that he cannot obtain the money with which to pay such fees.

Sworn and subscribed before me this 22d day of August, A. D. 1922. } JNO. M. SHUGERT,
Petitioner.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*

My commission expires March 6, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. .

In the Matter of John M. Shugert, George R. Meek Mary C. Harris, Florence F. Dale, Andrew Breeze Surviving Partners of Lavina Catherine Harris, Deceased, Individually and Trading as Centre County Banking Company, Against Whom a Petition for Adjudication in Bankruptcy Has Been Filed.

SUBPŒNA TO ALLEGED BANKRUPT.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

To George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, surviving partners of Lavina Catherine Harris, deceased, individually and trading as Centre County Banking Company, in said District:

GREETING:

For certain causes offered before the District Court of the United States of America within and for the Middle District of Pennsylvania, as a Court of Bankruptcy.

WE COMMAND AND STRICTLY ENJOIN YOU laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court, to be holden at Scranton, in said district, on the third day of October, A. D., 1922, to answer a petition filed by John M. Shugert, in our said court praying

that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the HONORABLE CHARLES B. WITMER, Judge of the said court, and the seal (Seal) thereof, at Scranton, this eighteenth day of September, A. D. 1922.

G. C. SCHEUER,
Clerk.

S. W. HOFFORD,
Deputy Clerk.

And now, to wit, September 20, A. D. 1922, I, MARY C. HARRIS, within named, do hereby appear in person to the within subpœna and accept service thereof and acknowledge receipt of copy of amended petition and schedules thereto attached, with the same force and effect as if the within subpœna had been served upon me, together with said amended petition and schedules, by the United States Marshal, and as provided by order of Charles B. Witmer, United States District Judge, which said order is dated September 15, 1922.

MARY C. HARRIS.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. NO. .

In the Matter of John M. Shugert, George R. Meek Mary C. Harris, Florence F. Dale, Andrew Breeze Surviving Partners of Lavina Catherine Harris, Deceased, Individually and Trading as Centre County Banking Company, Against Whom a Petition for Adjudication in Bankruptcy Has Been Filed.

SUBPŒNA TO ALLEGED BANKRUPT.

(Filed October 3, 1922.)

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

To George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, surviving partners of Lavina Catherine Harris, deceased, individually and trading as Centre County Banking Company, in said District:

GREETING:

For certain causes offered before the District Court of the United States of America within and for the Middle District of Pennsylvania, as a Court of Bankruptcy.

WE COMMAND AND STRICTLY ENJOIN YOU laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court, to be holden at Scranton, in said district, on the third day of October, A. D., 1922, to answer a petition filed by John M. Shugert, in our said court praying

that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the HONORABLE CHARLES B. WITMER, Judge of the said court, and the seal (Seal) thereof, at Scranton, this eighteenth day of September, A. D. 1922.

G. S. SCHEUER,
Clerk.

S. W. HOFFORD,
Deputy Clerk.

Now, to wit, September 20, A. D. 1922, served the within subpœna on Mary C. Harris personally, leaving with her a true and attested copy thereof, together with a copy of amended petition and schedules. Service was made at Bellefonte, within the Middle District of Pennsylvania.

So answers

JOHN H. GLASS,
United States Marshal.
Per A. J. HERR,
Deputy.

Now to wit, September 20, 1922, return the within subpœna N. E. I. as to Andrew Breeze.

So answers

JOHN H. GLASS,
United States Marshal.
Per T. F. PURCELL,
Deputy.

MARSHAL'S RETURN.

Now, to wit, September 25, A. D. 1922, served the within subpœna to alleged bankrupt upon Florence F. Dale, personally, individually and trading as the Centre County Banking Company, service was made in the City of Hazleton, County of Luzerne, and within the Middle District of Pennsylvania.

So answers

JOHN H. GLASS,
United States Marshal.
By GEORGE GREEN,
Deputy.

Now, to wit September 27, 1922, served the within subpœna to alleged bankrupt upon George R. Meek personally, individually and trading as the Centre County Banking Company, at his place of business on High Street, Bellefonte, County of Centre, and within the Middle District of Pennsylvania, by leaving with him a true copy of the within writ; together with a copy of debtor's petition.

So answers

JOHN H. GLASS,
U. S. Marshal.
By A. J. HERR,
Deputy U. S. Marshal.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,
Bankrupts.

MOTION TO DISMISS PETITION.

To Honorable Charles B. Witmer, Judge of the District Court of the United States for the Middle District of Pennsylvania:

George R. Meek, one of the persons mentioned in the amended petition in bankruptcy filed by John M. Shugert in the above stated case, appearing specially and only for the purpose of challenging the jurisdiction of the Court to allow the amendment to the original petition filed herein; to entertain said petition in bankruptcy or hear and determine the same or to award the subpœna issued thereon, makes and files herewith his motion to dismiss the said petition as to him and to quash the subpœna issued thereon for the reasons herein set forth, and prays that an order be made staying all further proceedings in said case until the motion herein filed shall be disposed of.

1. The District Court of the United States for the Middle District of Pennsylvania has no jurisdiction, right, power or authority to issue a subpœna in bankruptcy upon the voluntary petition of the said John M. Shugert requiring this respondent to show cause as set forth therein.

2. The District Court of the United States for the Middle District of Pennsylvania is without jurisdiction, right, power or authority to adjudicate this respondent

a bankrupt upon the voluntary petition of the said John M. Shugert for any cause or thing mentioned or set forth in the amended petition of the said John M. Shugert filed herein.

3. An involuntary proceeding in bankruptcy can only be instituted and maintained against this respondent by the required number of creditors in a petition filed by them setting forth therein one or more of the acts of bankruptcy prescribed in the Bankruptcy Act of 1898 and the amendments and supplements thereto, and this court is without jurisdiction to hear and determine the question of solvency or insolvency of this respondent or to adjudicate him a bankrupt upon the voluntary petition of the said John M. Shugert as filed herein.

4. That the original petition of John M. Shugert was a voluntary one on his part as an alleged partner, praying that the Centre County Banking Company, the alleged partnership, be declared a bankrupt consequently this court had no jurisdiction to allow the amendment subsequently prayed for by John M. Shugert that changed radically the subject matter as well as the nature of the proceeding from a purely voluntary one to an involuntary petition against the respondent.

5. There is no power or authority conferred by the laws of the United States authorizing or conferring jurisdiction upon the District Courts of the United States to hear and determine an involuntary petition filed by one partner for the purpose of having the partnership declared a bankrupt where it appears upon the face of the petition as in this case that before the petition in bankruptcy was filed the partnership was dissolved by the death of one of the partners and the estate of such deceased partner is in process of ad-

ministration in the Orphans' Court of Centre County, Pennsylvania, as stated in said petition.

6. Neither the Bankruptcy Act of 1898 nor any other law of the United States confers power or authority upon one partner to file a petition in bankruptcy in the partnership name for the purpose of having the partnership declared a bankrupt where one or more of the remaining partners do not assent or consent thereto.

7. In so far as general order No. 8 of the Supreme Court of the United States attempts to confer jurisdiction upon courts of bankruptcy to adjudicate as bankrupts non-consenting partners who refuse to join in a bankruptcy petition instituted by one partner, said general order is in effect legislation not authorized by the Constitution and laws of the United States and is in violation thereof, and the enforcement of the provisions of said order against this respondent in these proceedings would be a denial as to him of the equal protection of the laws of the United States, and would amount to a taking of his property without due process of law which right, privilege, and immunity are conferred upon him as a citizen of the United States by the Constitution thereof.

8. The Bankruptcy Act of 1898 and amendments thereto do not authorize the filing of a voluntary petition in bankruptcy by one partner without the consent of all of the other partners.

9. After the dissolution of a partnership by operation of law, *viz.*, the death of one or more of the partners, one of the surviving partners cannot institute bankruptcy proceedings and have the former partnership adjudicated a bankrupt.

10. For other reasons appearing upon the face of the petition filed by said John M. Shugert, the said

Court is without jurisdiction to adjudicate this respondent a bankrupt as prayed for in said petition and is without jurisdiction to adjudicate said partnership bankrupt in said proceeding.

Wherefore, respondent files *this his motion to dismiss* the said petition in bankruptcy and set aside the subpœna issued against him therein at the cost of the said John M. Shugert and prays that an order be made staying all further proceedings in said case until this motion shall be disposed of by the Court.

GEO. R. MEEK.

STATE OF PENNSYLVANIA, }
COUNTY OF CENTRE, } *ss.:*

George R. Meek, being duly sworn deposes and says that the facts set forth in the foregoing petition are true in so far as he has personal knowledge of the same, and in so far as they are averred upon information he believes them to be true.

Sworn and subscribed to before me this 30th day of September, A. D. 1922. } GEO. R. MEEK.

BELLE WEAVER,
(Seal) *Notary Public.*
My commission expires February 19, 1925.

October 3, 1922, directed to be filed. Hearing fixed for Monday, October 9, 1922, at 10 o'clock A. M.

CHARLES B. WITMER,
District Judge.

October 20, 1922 after argument and on due consideration the motion to dismiss is denied.

CHARLES B. WITMER,
District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, Surviving Partners of Lavina Catherine Harris, Deceased, Individually, and Trading as Centre County Banking Company,

Bankrupts.

ANSWER

OF JOHN M. SHUGERT TO PETITION OF GEORGE R. MEEK FOR RULE TO DISMISS THE PETITION IN BANKRUPTCY AND SET ASIDE THE SUBPŒNA ISSUED AGAINST HIM.

(Filed October 13, 1922.)

To the Honorable Charles B. Witmer, Judge of the District Court of the United States for the Middle District of Pennsylvania:

The answer of JOHN M. SHUGERT to the petition for a rule in the above stated case, respectfully represents:

First.—That it is not true, as set forth in paragraph one of the petition of the said George R. Meek, that your Honorable Court has no jurisdiction, right, power or authority to issue a subpœna in bankruptcy upon the voluntary petition filed by myself, but said Court has jurisdiction of said cause of action to require the said George R. Meek to show cause why he should not be declared a bankrupt, as a partner in the Centre County Banking Company.

Second.—That it is not true, as set forth in paragraph two of the petition of the said George R. Meek,

that the said Court is without jurisdiction, right, power or authority to adjudicate him a bankrupt, upon the petition filed by me as amended.

Third.—That it is not true, as set forth in paragraph three of the petition of the said George R. Meek, that only an involuntary proceeding in bankruptcy can be instituted and maintained against him by the required number of creditors setting forth one or more acts of bankruptcy, neither is it true that the said Court is without jurisdiction to hear and determine the question of solvency or insolvency of the said George R. Meek or to adjudicate him a bankrupt upon the voluntary petition as amended, filed by me. Respondent further avers that it is not necessary nor mandatory under the Bankruptcy Act of 1898 and its amendments, that where a voluntary petition is filed by one member of a partnership, on behalf of the said partnership, and the other members not joining, an act of bankruptcy should be alleged as to such non-joining members.

Fourth.—In answer to paragraph four of the petition of the said George R. Meek, this respondent avers that your Honorable Court on the fifteenth day of September, 1922, allowed the application to amend the original petition filed by me, which said amended petition, *inter alia*, prays that all members of said partnership be adjudged bankrupts, and that by the same order the subpœna theretofore issued was quashed by the said Court and a new subpœna directed to be issued in accordance with the amended petition. That said proceedings, after said amendment and the quashing of said subpœna, are proceedings *de novo*, as upon the original petition. That notice was accepted of the application to amend said petition, prior to the time

that the same was filed in said court, by counsel for the said George R. Meek, and no answer filed or objection made thereto.

Fifth.—Your respondent avers that the allegations contained in paragraph five of the petition of the said George R. Meek are not true, but that the business of said copartnership was continued after the death of Lavina Catherine Harris, evidently referred to in said paragraph, until the time that the business was suspended on May 13, 1922. That the said Court has ample authority, jurisdiction and power under the Bankruptcy Act of 1898 and its amendments to declare the surviving partners bankrupts.

Sixth.—That it is not true, as set forth in paragraph six of the petition of the said George R. Meek, that neither the Bankruptcy Act of 1898, nor any other law of the United States, confers power or authority upon one partner to file a petition in bankruptcy in the partnership name, for the purpose of having the partnership declared a bankrupt, where one or more of the remaining partners do not assent or consent thereto. Respondent avers that the said Bankruptcy Act does authorize a petition in bankruptcy to be filed by one partner, where all do not consent to join on behalf of the partnership and the individual members thereof, and that under the Bankruptcy Act, above referred to, and its amendments, the said Court is authorized to declare all of the members of such partnership, as well as the partnership itself, bankrupts.

Seventh.—Your respondent avers that the allegations set forth in paragraph seven of the petition of the said George R. Meek, are not true, but that General Order Number Eight of the Supreme Court

of the United States is an order defining the method of procedure in bankruptcy, duly promulgated by said Court under the powers conferred upon it, by the Bankruptcy Act of 1898 and its amendments, and is not in violation of the Constitution of the United States, and is not a denial of the equal protection of the laws of the United States, nor of the taking of property without due process of law. Respondent further avers that said order has the effect of law and is not in violation of any constitutional right, but provides a method for putting into effect the said Bankruptcy Act.

Eighth.—That the allegations set forth in paragraph eight of the petition of the said George R. Meek are not true, but the said Court, as respondent is informed, has ample jurisdiction to declare all partners bankrupts upon the petition of one or more partners.

Ninth.—That the allegations set forth in paragraph nine do not apply to the copartnership of the Centre County Banking Company, and that it is not true that after the death of one partner, there was a dissolution as to the others, but that said partnership continued business until they were financially unable to do so any longer and were compelled to close their doors for the purpose of a settlement of said partnership affairs, as authorized by the Bankruptcy Act.

Tenth.—That your respondent denies the allegations of paragraph ten of the petition of the said George R. Meek, but avers that under the amended petition filed the said Court has ample jurisdiction to adjudicate the said George R. Meek, as well as all other surviving partners of the Centre County Banking Company, bankrupts.

WHEREFORE, this respondent prays your Honorable Court that the motion to dismiss the petition in bankruptcy, made by the said George R. Meek, and to set aside subpœna issued under said amended petition, be dismissed at his costs.

JNO. M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY OF CENTRE, } *ss.:*

Before me, the undersigned, a notary public in and for said State and county, personally appeared JOHN M. SHUGERT, above named, who being duly sworn according to law, doth depose and say that the facts set forth in the foregoing answer are true and correct to the best of his knowledge, information and belief.

Sworn and subscribed before me this 12th day of October, A. D. 1922. } JNO. M. SHUGERT.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*

My commission expires March 6, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually, Bankrupts.

MOTION TO DISMISS PETITION.

(Filed October 3, 1922.)

To Honorable Charles B. Witmer, Judge of the District Court of the United States for the Middle District of Pennsylvania:

Florence F. Dale, one of the persons mentioned in the amended petition in bankruptcy filed by John M. Shugert in the above-stated case, appearing specially and only for the purpose of challenging the jurisdiction of the court to allow the amendment to the original petition filed herein; to entertain said petition in bankruptcy or hear and determine the same or to award the subpœna issued thereon, makes and files herewith her motion to dismiss the said petition as to her and to quash the subpœna issued thereon for the reasons herein set forth, and prays that an order be made staying all further proceedings in said case until the motion herein filed shall be disposed of.

1. The District Court of the United States for the Middle District of Pennsylvania has no jurisdiction, right, power or authority to issue a subpœna in bankruptcy upon the voluntary petition of the said John M. Shugert requiring this respondent to show cause as set forth therein.

2. The District Court of the United States for the Middle District of Pennsylvania is without jurisdiction, right, power or authority to adjudicate this respondent a bankrupt upon the voluntary petition of the said John M. Shugert for any cause or thing mentioned or set forth in the amended petition of the said John M. Shugert filed herein.

3. An involuntary proceeding in bankruptcy can only be instituted and maintained against this respondent by the required number of creditors in a petition filed by them setting forth therein one or more of the acts of bankruptcy prescribed in the Bankruptcy Act of 1898 and the amendments and supplements thereto, and this Court is without jurisdiction to hear and determine the question of solvency or insolvency of this respondent or to adjudicate her a bankrupt upon the voluntary petition of the said John M. Shugert as filed herein.

4. That the original petition of John M. Shugert was a voluntary one on his part as an alleged partner, praying that the Centre County Banking Company, the alleged partnership, be declared a bankrupt; consequently, this Court had no jurisdiction to allow the amendment subsequently prayed for by John M. Shugert that changed radically the subject matter as well as the nature of the proceeding from a purely voluntary one to an involuntary petition against the respondent.

5. There is no power or authority conferred by the laws of the United States authorizing or conferring jurisdiction upon the District Courts of the United States to hear and determine an involuntary petition filed by one partner for the purpose of having the partnership declared a bankrupt where it appears upon the face of the petition as in this case that before the petition in bankruptcy was filed the partnership

was dissolved by the death of one of the partners and the estate of such deceased partner is in process of administration in the Orphans' Court of Centre County, Pennsylvania, as stated in said petition.

6. Neither the Bankruptcy Act of 1898 nor any other law of the United States confers power or authority upon one partner to file a petition in bankruptcy in the partnership name for the purpose of having the partnership declared a bankrupt where one or more of the remaining partners do not assent or consent thereto.

7. In so far as General Order No. 8 of the Supreme Court of the United States attempts to confer jurisdiction upon courts of bankruptcy to adjudicate as bankrupts non-consenting partners who refuse to join in a bankruptcy petition instituted by one partner, said general order is in effect legislation not authorized by the Constitution and laws of the United States and is in violation thereof, and the enforcement of the provisions of said order against this respondent in these proceedings would be a denial as to her of the equal protection of the laws of the United States, and would amount to a taking of her property without due process of law which right, privilege, and immunity are conferred upon her as a citizen of the United States by the Constitution thereof.

8. The Bankruptcy Act of 1898 and amendments thereto do not authorize the filing of a voluntary petition in bankruptcy by one partner without the consent of all of the other partners.

9. After the dissolution of a partnership by operation of law, *viz.*, the death of one or more of the partners, one of the surviving partners cannot institute bankruptcy proceedings and have the former partnership adjudicated a bankrupt.

10. For other reasons appearing upon the face of the petition filed by said John M. Shugert, the said Court is without jurisdiction to adjudicate this respondent a bankrupt as prayed for in said petition and is without jurisdiction to adjudicate said partnership bankrupt in said proceeding.

Wherefore, respondent files this her motion to dismiss the said petition in bankruptcy and set aside the subpœna issued against her therein at the cost of the said John M. Shugert and prays that an order be made staying all further proceedings in said case until this motion shall be disposed of by the Court.

FLORENCE F. DALE,
By her Attorney, Ellis L. Orvis.

STATE OF PENNSYLVANIA, }
COUNTY OF } *ss.:*

Florence F. Dale by her attorney, Ellis L. Orvis, being duly sworn deposes and says that the facts set forth in the foregoing petition are true in so far as she has personal knowledge of the same, and in so far as they are averred upon information she believes them to be true.

Sworn and subscribed to before me this 2d day of October, A. D. 1922. } FLORENCE F. DALE, *By her Attorney, Ellis L. Orvis.*

BELLE WEAVER,
(Seal) *Notary Public.*
My commission expires February 19, 1925.

October 20, 1922, after argument and on due consideration, the motion to dismiss is denied.

CHARLES B. WITMER,
District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, Surviving Partners of Lavina Catherine Harris, Deceased, Individually, and Trading as Centre County Banking Company,

Bankrupts.

ANSWER

OF JOHN M. SHUGERT TO PETITION OF FLORENCE F. DALE FOR RULE TO DISMISS THE PETITION IN BANKRUPTCY AND SET ASIDE THE SUBPŒNA ISSUED AGAINST HER.

(Filed October 13, 1922.)

To the Honorable Charles B. Witmer, Judge of the District Court of the United States for the Middle District of Pennsylvania:

The answer of JOHN M. SHUGERT to the petition for a rule in the above stated case, respectfully represents:

First.—That it is not true, as set forth in paragraph one of the petition of the said Florence F. Dale, that your Honorable Court has no jurisdiction, right, power or authority to issue a subpœna in bankruptcy upon the voluntary petition filed by myself, but said Court has jurisdiction of said cause of action to require the said Florence F. Dale to show cause why she should not be declared a bankrupt, as a partner in the Centre County Banking Company.

Second.—That it is not true, as set forth in paragraph two of the petition of the said Florence F. Dale, that the said Court is without jurisdiction, right, power or authority to adjudicate her a bankrupt, upon the petition filed by me as amended.

Third.—That it is not true, as set forth in paragraph three of the petition of the said Florence F. Dale, that only an involuntary proceeding in bankruptcy can be instituted and maintained against her by the required number of creditors setting forth one or more acts of bankruptcy, neither is it true that the said Court is without jurisdiction to hear and determine the question of solvency or insolvency of the said Florence F. Dale or to adjudicate her a bankrupt upon the voluntary petition as amended, filed by me. Respondent further avers that it is not necessary nor mandatory under the Bankruptcy Act of 1898 and its amendments, that, where a voluntary petition is filed by one member of a partnership, on behalf of the said partnership, and the other members not joining, an act of bankruptcy should be alleged as to such non-joining members.

Fourth.—In answer to paragraph four of the petition of the said Florence F. Dale, thi respondent avers that your Honorable Court on the fifteenth day of September, 1922 allowed the application to amend the original petition filed by me, which said amended petition, *inter alia,* prays that all members of said partnership be adjudged bankrupts, and that by the same order the subpœna theretofore issued was quashed by the said Court and a new subpœna directed to be issued in accordance with the amended petition. That said proceedings, after said amendment and the quashing of said subpœna, are proceedings *de novo,* as upon the original petition. That no-

tice was accepted of the application to amend said petition, prior to the time that the same was filed in said court, by counsel for the said Florence F. Dale, and no answer filed or objection made thereto.

Fifth.—Your respondent avers that the allegations contained in paragraph five of the petition of the said Florence F. Dale are not true, but that the business of said copartnership was continued after the death of Lavina Catherine Harris, evidently referred to in said paragraph, until the time that the business was suspended on May 13, 1922. That the said Court has ample authority, jurisdiction and power under the Bankruptcy Act of 1898 and its amendments to declare the surviving partners bankrupts.

Sixth.—That it is not true, as set forth in paragraph six of the petition of the said Florence F. Dale, that neither the Bankruptcy Act of 1898, nor any other law of the United States, confers power or authority upon one partner to file a petition in bankruptcy in the partnership name, for the purpose of having the partnership declared a bankrupt, where one or more of the remaining partners do not assent or consent thereto. Respondent avers that the said Bankruptcy Act does authorize a petition in bankruptcy to be filed by one partner, where all do not consent to join on behalf of the partnership and the individual members thereof, and that under the Bankruptcy Act, above referred to, and its amendments, the said Court is authorized to declare all of the members of such partnership, as well as the partnership itself, bankrupts.

Seventh.—Your respondent avers that the allegations set forth in paragraph seven of the petition of the said Florence F. Dale, are not true, but that General Order Number Eight of the Supreme Court

of the United States is an order defining the method of procedure in bankruptcy, duly promulgated by said Court under the powers conferred upon it, by the Bankruptcy Act of 1898 and its amendments, and is not in violation of the Constitution of the United States, and is not a denial of the equal protection of the laws of the United States, nor of the taking of property without due process of law. Respondent further avers that said order has the effect of law and is not in violation of any constitutional right, but provides a method for putting into effect the said Bankruptcy Act.

Eighth.—That the allegations set forth in paragraph eight of the petition of the said Florence F. Dale are not true, but the said Court, as respondent is informed, has ample jurisdiction to declare all partners bankrupts upon the petition of one or more partners.

Ninth.—That the allegations set forth in paragraph nine do not apply to the copartnership of the Centre County Banking Company, and that it is not true that after the death of one partner, there was a dissolution as to the others, but that said partnership continued business until they were financially unable to do so any longer and were compelled to close their doors for the purpose of a settlement of said partnership affairs, as authorized by the Bankruptcy Act.

Tenth.—That your respondent denies the allegations of paragraph ten of the petition of the said Florence F. Dale, but avers that under the amended petition filed the said Court has ample jurisdiction to adjudicate the said Florence F. Dale, as well as all other surviving partners of the Centre County Banking Company, bankrupts.

WHEREFORE, this respondent prays your Honorable Court that the motion to dismiss the petition in bankruptcy, made by the said Florence F. Dale, and to set aside the subpœna issued under said amended petition, be dismissed at her costs.

JNO. M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY OF CENTRE, } *ss.:*

Before me, the undersigned, a notary public in and for said State and county, personally appeared JOHN M. SHUGERT, above named, who being duly sworn according to law, doth depose and say that the facts set forth in the foregoing answer are true and correct to the best of his knowledge, information and belief.

Sworn and subscribed before me this 12th day of October, A. D. 1922. } JNO. M. SHUGERT.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*

My commission expires March 6, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,
Bankrupts.

PETITION OF GEORGE R. MEEK TO REVISE IN MATTER OF LAW.

(Filed October 27, 1922.)

To the Honorable the Judges of the Circuit Court of Appeals of the Third Circuit of the United States:

Your petitioner respectfully shows:

That one John M. Shugert on the eleventh day of July, 1922, filed a voluntary petition in bankruptcy in the District Court of the United States for the Middle District of Pennsylvania in which he set forth *inter alia* that he and others including your petitioner were partners trading as Centre County Banking Company and that he the said John M. Shugert was insolvent and that said partnership was insolvent, that said petition contained a prayer that the said Shugert and said partnership should be adjudicated bankrupt.

Thereafter the said Shugert filed an amended petition by leave of Court in which it is set forth, *inter alia:*

> "That your petitioner (the said John M. Shugert) and George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze who survived Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Bank-

ing Company which partnership has had its principal place of business at the Borough of Bellefonte in the County of Centre in said district for the greater portion of the six months immediately preceding the filing of this petition; and that said partnership is insolvent and owes debts in excess of one thousand dollars ($1,000.00). That the said Lavina Catherine Harris died on or about the tenth day of January A. D. 1921 and her estate will be administered by the orphans court of Centre County upon the filing of the account of John Blanchard and Sarah C. Brown, her executors. That such partnership and your petitioner are willing to surrender its and his property for the benefit of its and his creditors respectfully except such as is exempt by law and desires to obtain the benefits of the bankruptcy law of 1898 as amended."

Said amended petition then sets out the residences of your petitioner and other persons named in said petition and avers that none of them are wage earners or persons engaged chiefly in farming or the tillage of the soil and as individuals owe debts which they are unable to pay in full. That there has been no final settlement of said partnership doing business as Centre County Banking Company; and there are debts of said partnership which are unsettled and unpaid amounting to more than one thousand dollars ($1000). That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts.

Said petition then sets forth that the schedules of the said John M. Shugert individually and as represented by him, the schedules of said partnership are attached to said petition.

The prayer of said amended petition is:

"Wherefore your petitioner prays that such partnership as well as George R. Meek, Mary C.

Harris, Florence F. Dale, Andrew Breeze and your petitioner, surviving partners of Lavina Catherine Harris, deceased, may as individuals as well as said firm be adjudged bankrupt within the purview of such bankruptcy law of 1898 and that service of this petition with a subpœna be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners and that proceedings be had as are provided in said law and General Order No. VIII of the Supreme Court and as the court may order."

That your petitioner appeared specially in answer to said subpœna and only for the purpose of moving to dismiss said amended petition in bankruptcy for the following reasons:

(A) That said court was without jurisdiction upon the voluntary petition of John Shugert to issue a subpœna requiring this respondent to show cause why he should not be adjudged bankrupt.

(B) That said court was without jurisdiction upon the voluntary petition of said John M. Shugert to adjudicate this respondent a bankrupt.

(C) That an involuntary petition in bankruptcy can only be instituted against this respondent by the required number of creditors upon proof of his having committed one of the acts of bankruptcy specified in the act.

(D) That the said court had no jurisdiction to allow the amended petition of said John M. Shugert.

(E) That a bankruptcy proceeding cannot be instituted against a partnership by one partner where it appears upon the face of the petition that before the petition in bankruptcy was filed the partnership was dissolved by the

death of one of the partners and the estate of such deceased partner in process of administration in the Orphans' Court of the proper county.

(F) That the Bankruptcy Act confers no power or authority on one partner to file a petition in bankruptcy in the partnership name where one or more of the remaining partners do not assent or consent thereto.

(G) That so much of General Order No. VIII of the Supreme Court as attempts to confer jurisdiction upon the courts of bankruptcy to adjudicate as bankrupts non-consenting partners who refuse to join in a bankruptcy petition is legislation not authorized by the Constitution of the United States and the laws thereof and is in violation thereof as to the due process clause and the equal protection of the law clause of the Constitution of the United States.

(H) No provision is made in the Bankruptcy Law of 1898 for the adjudication of partnership upon the petition of one of the partners without the consent of all of the partners.

(I) That after a dissolution of a partnership by operation of law one of the surviving partners cannot institute bankruptcy proceedings in behalf of or against the partnership.

That after hearing argument thereon the District Court for the said Middle District made the following order therein:

"October 20th, 1922, after argument and due consideration the motion to dismiss is denied.

"CHARLES B. WITMER,
"*District Judge.*"

That said order was erroneous in matter of law in that the District Court of the United States for said Middle District of Pennsylvania erred in not sustaining petitioner's motion to dismiss said amended petition in bankruptcy and erred in making the order denying the motion filed by this petitioner to dismiss said petition in bankruptcy.

Petitioner here assigns for error more particularly the several errors he believes the Court made in the order of October 20, 1922.

1. The Court erred in not sustaining the petition to dismiss upon the ground that,

> Said Court was without jurisdiction upon the voluntary petition of John M. Shugert to issue a subpœna requiring this respondent to show cause why he should not be adjudged bankrupt.

2. The Court erred in not sustaining petitioner's motion to dismiss said petition for the reason,

> That said Court was without jurisdiction upon the voluntary petition of said John M. Shugert to adjudicate this respondent a bankrupt.

3. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason,

> That an involuntary petition in bankruptcy can only be instituted against this respondent by the required number of creditors upon proof of his having committed one of the acts of bankruptcy specified in the act.

4. That the Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason,

> That the said Court had no jurisdiction to allow the amended petition of said John M. Shugert.

5. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason,

That a bankruptcy proceeding cannot be instituted against a partnership by one partner where it appears upon the face of the petition that before the petition in bankruptcy was filed the partnership was dissolved by the death of one of the partners and the estate of such deceased partner is in process of administration in the Orphans' Court of the proper county.

6. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That the Bankruptcy Act confers no power or authority on one partner to file a petition in bankruptcy in the partnership name where one or more of the remaining partners do not assent or consent thereto.

7. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That so much of General Order No. VIII of the Supreme Court as attempts to confer jurisdiction upon the courts of bankruptcy to adjudicate as bankrupts non-consenting partners who refuse to join in a bankruptcy petition is legislation not authorized by the Constitution of the United States the laws thereof and is in violation thereof as to the due process clause and the equal protection of the laws clause of the Constitution of the United States.

8. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

No provision is made in the Bankruptcy Law of 1898 for the adjudication of a partnership upon the petition of one of the partners.

9. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That after a dissolution of a partnership by operation of law one of the surviving partners cannot institute bankruptcy proceedings in behalf of or against the partnership.

Wherefore your petitioner, feeling aggrieved because of such order, asks that the same may be revised in matter of law by your Honorable Court as provided in section 24b of the Bankruptcy Law of 1898 as amended and the rules and practice in such case made is provided.

GEO. R. MEEK,
Petitioner.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

George R. Meek, being duly sworn deposes and says that the facts set forth in the foregoing petition to revise are true.

Subscribed and sworn to before me this 26th day of October, 1922. } GEO. R. MEEK.

CLEMENT DALE,
(Seal) *Notary Public.*
Commission expires March 12, 1925.

Notice of the filing of this petition accepted, October 26, 1922.

S. D. GETTIG,
Attorney for Bankrupt Petitioner.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,

Bankrupts.

MOTION TO DISMISS PETITION TO REVISE IN MATTER OF LAW FILED BY GEORGE R. MEEK AND PROTEST AGAINST THE ALLOWANCE OF SAME.

(Filed November 2, 1922.)

To the Honorable, the Judges of the Circuit Court of Appeals of the Third Circuit of the United States:

The petition of John M. Shugert, above named, respectfully shows:

That the petition presented to your Honorable Court by George R. Meek to revise in matter of law the decree of the District Court of the United States in the above-stated case, as therein set forth, should not be allowed, but should be dismissed for the following reasons:

First.—That it is not true, as in said petition set forth, by the said George R. Meek, that this respondent on the eleventh day of July, 1922, filed a voluntary petition in bankruptcy in the District Court of the United States for the Middle District of Pennsylvania, but that said petition was filed in said Court on or about the thirtieth day of June, 1922.

Second.—That on the thirty-first day of July, 1922, the said George R. Meek filed an answer to the merits of said petition denying that he was a partner and also raising a question of law, namely, that he could not be brought within the jurisdiction of the said court as a partner, or in any other relation in said proceedings. That to the answer, so filed, there appeared as his counsel in said District Court, Harry Keller and Orvis and Zerby.

Third.—That subsequent to the filing of said answer and the appearance in said court generally by himself and his counsel, to wit, on or about the eighteenth day of August, 1922, as stated in the preceding paragraph, the said George R. Meek, filed a petition upon a motion to quash the subpœna served upon him.

Fourth.—That this respondent on or about the twenty-third day of August, 1922, filed in the said District Court a petition asking leave to amend the original petition in bankruptcy filed, of which Ellis L. Orvis, attorney for George R. Meek, accepted notice of filing and acknowledged receipt of copy of the proposed amendment. That the said George R. Meek filed no protest to the allowance of the amendment prayed for, nor did he file a new or supplemental answer within ten days after the allowance of said amendment, as provided by Rule 32 of the United States Equity Rules.

Fifth.—That the said District Court heard and disposed of at the same time the motion of the said George R. Meek to quash the subpœna, which had been issued and served on him, in pursuance to the original petition filed in the above-stated case and the amendment to said original petition, and thereupon on the fifteenth day of September, 1922, quashed the sub-

pœna served on the said Meek, allowing the amendment to the original petition, and directed the clerk to issue a subpœna, in accordance with the petition as amended.

Sixth.—That the said George R. Meek, so far as this respondent is informed, has never presented a petition to your Honorable Court for a revision as matter of law of the decree made by the said District Court on the fifteenth day of September, 1922, allowing said amendment, and under Section 8 of Rule 14 of this court, more than thirty days having elapsed, it is too late to attempt to revise said decree in this proceeding.

Seventh.—That the decree of the said District Court of October 20, 1922, which the said Meek prays may be revised by your Honorable Court, was based upon a petition of the said Meek to the said District Court, filed on or about the first day of October, 1922, wherein he prays the said court, upon motion, to dismiss the said petition in bankruptcy and set aside the subpœna issued under and in pursuance of the amended petition.

As a further reason why said petition should not be allowed, this respondent avers:

Eighth.—Because the order of the District Court of October 20, 1922, so far as the same relates to the amended petition allowed by the Court, is a confirmation of the former order of September 15, 1922, allowing said amendment, and is, therefore, not subject to revision under the Bankruptcy Act.

Ninth.—Because no hearing has yet been held by the District Court upon the question of the insolvency of the Centre County Banking Company, of which the

said George R. Meek is a partner, and said decree of October 20, 1922, having been made prior to any adjudication in bankruptcy against the said Meek, no material injury or rights, to which he may be entitled, have been thereby materially affected.

Tenth.—Because it is unusual and extraordinary that the petition should be allowed, based upon the decree made prior to an adjudication in bankruptcy.

Eleventh.—That said petition should not be allowed, because there is not attached thereto any certified copies of the records of the District Court in said proceeding, nor does it contain sufficient facts *prima facie* to justify an allowance of the same.

Twelfth.—Because Section 25 of the Bankruptcy Act provides for an appeal from a judgment, which may or may not adjudge the said Meek a bankrupt, and the said decree of October 20, 1922, is not such an interlocutory decree affecting the rights of the said Meek, as will move your Honorable Court to allow said petition.

Thirteenth.—Because this respondent, by his counsel, S. D. Gettig, was requested by Ellis L. Orvis, counsel for George R. Meek, on the twenty-sixth day of October, 1922, to accept notice of the filing of the petition of said Meek in this court, which notice was accordingly accepted, but your respondent and his said counsel did not receive ten days previous notice of the time of the presentation of said petition to your Honorable Court, as required by Section 8 of Rule 14 of this court.

WHEREFORE, this respondent protests and prays the said court that the petition of the said George R. Meek be not allowed, but that the same be dismissed with costs to the said petitioner.

JNO. M. SHUGERT,
Respondent.

S. D. GETTIG,
Attorney for John M. Shugert,
East High Street,
Bellefonte, Penna.

N. B. SPANGLER,
Attorney for Creditors' Committee of Centre County Banking Company,
Crider's Exchange Building,
Bellefonte, Penna.

STATE OF PENNSYLVANIA, }
COUNTY OF CENTRE, } *ss.:*

I, JOHN M. SHUGERT, the respondent mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information and belief.

Sworn and subscribed before me this thirty-first day of October, A. D. 1922. } JNO. M. SHUGERT.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*
My commission expires March 6, 1925.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

October Term, 1922. No. 2945.

George R. Meek,
Petitioner,

v.

Centre County Banking Company, a Partnership, and John M. Shugert, Individually, Bankrupts,
Respondents.

ANSWER

TO PETITION OF GEORGE R. MEEK TO REVISE IN MATTER OF LAW DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

(Filed November 18, 1922.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The answer of JOHN M. SHUGERT, above named, to the petition of George R. Meek to revise in matter of law decree of the District Court of the United States for the Middle District of Pennsylvania, respectfully represents:

First.—Said decree should not be revised for the following reasons:

The original petition, together with schedules thereto attached, in bankruptcy, were filed by this respondent in the Middle District of Pennsylvania, on or about the thirtieth day of June, 1922, instead of July 11, 1922, as set forth in the petition of the said Meek, to which said petition the said Meek on or about the thirty-first day of July, 1922, filed an answer to the merits of said petition, denying that he

was a partner of the Centre County Banking Company and raising a question of law, namely, that he could not be brought within the jurisdiction of the said court, as a partner, or in any other relation in said proceedings. That to the answer so filed there appeared as his counsel for and on behalf of the said George R. Meek in said District Court, Harry Keller, and Orvis and Zerby. That subsequent to the filing of said answer and the appearance in said Court generally by himself and by his said counsel, to wit, on or about the eighteenth day of August, 1922, the said George R. Meek presented a petition to the said District Court, upon a motion to quash the subpœna served upon him, in pursuance to the original petition in bankruptcy filed by myself individually and on behalf of said partnership. That this respondent on or about the twenty-third day of August, 1922, filed in said District Court a petition asking leave to amend the original petition in bankruptcy, notice of which filing was accepted by Ellis L. Orvis, attorney for George R. Meek, who at the same time acknowledged receipt of copy of petition for the proposed amendment. That the said George R. Meek filed no protest to the allowance of the amendment prayed for, nor answer thereto, as provided by Rule 32 of the General Rules of Practice for the Courts of Equity of the United States. That the said District Court heard and disposed of at the same time the motion of the said George R. Meek to quash the subpœna served upon him, in pursuance of the original petition in bankruptcy filed by this respondent, and the petition asking leave to amend the original petition in bankruptcy, and thereupon on the fifteenth day of September, 1922, the said Court, with reference to said motion and said amendment, made the following order:

"September 15th, 1922, after argument on the showing made and on due consideration, the Court being satisfied that the subpœna issued was not in conformity with the initial petition filed, the subpœna is quashed.

"The amendment of the original petition as now presented is allowed and the Clerk is directed to issue a subpœna as prayed for in the petition as amended.

"Service of subpœna to be made on Andrew Breeze, if personal service cannot be obtained on him, by publishing this order together with such subpœna in the *Keystone Gazette*, a newspaper published at Bellefonte, in said district, for two consecutive weeks; the last of said publication to be made on or before the 10th day of October, 1922, and by mailing copy of this order and subpœna, to the last place of abode of Andrew Breeze, to wit, Downingtown, Penna., in the Eastern District of Pennsylvania on or before the date of the first publication.

"By THE COURT,
"Charles B. Witmer,
"U. S. Dist. Judge."

Second.—That the said George R. Meek has never presented a petition to your Honorable Court for a revision as matter of law of the order and decree made by the said District Court on the fifteenth day of September, 1922, above quoted, allowing said amendment, and under Section 8 of Rule 14 of this Court, more than thirty days having elapsed, said decree will not now be revised in this proceeding.

Third.—Because the decree of the District Court of October 20, 1922, which the said petitioner prays may be revised by your Honorable Court, was made in pursuance of a petition of the said Meek to the said District Court, filed on or about the first day of October, 1922, wherein he prays the said Court, upon motion, to dismiss the said petition in bankruptcy as amended and

allowed by the said Court, as above stated, and set aside the subpœna issued under and in pursuance of the said amended petition and served upon the said Meek, which was an attempt on the part of the said George R. Meek to have the said District Court revise its former decree of September 15, 1922.

Fourth.—Because this Court has no power or authority under the present proceedings to revise as a matter of law the decree of the District Court of October 20, 1922, so as in any manner to affect the prior decree made by said Court on September 15, 1922, allowing said amended petition, in pursuance of which the subpœna was served on the said Meek, to show cause why he should not be declared a bankrupt.

Fifth.—Because the order of the District Court of October 20, 1922, so far as the same relates to the amended petition allowed by the Court, filed by this respondent, is a confirmation of the former order of said Court of September 15, 1922, allowing said amendment, and is, therefore, not subject to revision under the Bankruptcy Act, so as to annul or modify the former order made by said Court.

Sixth.—Because no hearing has yet been held by the District Court, upon the question of the solvency of the Centre County Banking Company, nor has it yet been determined whether or not the said George R. Meek is in fact a partner in said Centre County Banking Company and said decree of October 20, 1922, is not an interlocutory decree of such a definite character, as will move your Honorable Court to revise the same.

Seventh.—Because orders and decrees made by a Court of Bankruptcy, prior to an adjudication, are not of such a definite character as will prejudice the rights of an alleged bankrupt, and it is unusual and extraordinary to revise as a matter of law such order or decree.

Eighth.—Because Section 25 of the Bankruptcy Act provides for an appeal from a judgment, which may or may not adjudge the said petitioner a bankrupt, and said decree of October 20, 1922, is not such an interlocutory decree affecting his rights, as will move your Honorable Court to revise the same.

WHEREFORE, this respondent protests and prays the said Court to dismiss the petition of the said Meek at his cost.

JNO. M. SHUGERT.

S. D. GETTIG,
Attorney for John M. Shugert,
11 East High Street,
Bellefonte, Pa.

N. B. SPANGLER,
Attorney for Creditors' Committee of Centre County Banking Company,
Crider's Exchange Bldg.,
Bellefonte, Pa.

STATE OF PENNSYLVANIA, } *ss.:*
COUNTY OF CENTRE, }

JOHN M. SHUGERT, the respondent mentioned and described in the foregoing answer, does hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information and belief.

Sworn and subscribed before me this 16th day of November, A. D. 1922. } JNO. M. SHUGERT.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*
My commission expires March 6, 1925

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,

Bankrupts.

PETITION OF FLORENCE F. DALE TO REVISE IN MATTER OF LAW.

(Filed October 30, 1922.)

To the Honorable, the Judges of the Circuit Court of Appeals of the Third Circuit of the United States:

Your petitioner respectfully shows:

That one, John M. Shugert, on the eleventh day of July, 1922, filed a voluntary petition in bankruptcy in the District Court of the United States for the Middle District of Pennsylvania, in which he set forth *inter alia* that he and others, including your petitioner, were partners trading as Centre County Banking Company and that he, the said John M. Shugert, was insolvent and that said partnership was insolvent, that said petition contained a prayer that the said Shugert and said partnership should be adjudicated bankrupt.

Thereafter the said Shugert filed an amended petition by leave of court in which it is set forth, *inter alia:*

> "That your petitioner (the said John M. Shugert) and George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, who survived Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company which partnership has had its principal place of business at the Borough of Bellefonte in the County

of Centre in said district for the greater portion of the six months immediately preceding the filing of this petition; that said partnership is insolvent and owes debts in excess of one thousand dollars ($1,000.00). That the said Lavina Catherine Harris died on or about the tenth day of January, A. D. 1921, and her estate will be administered by the Orphans' Court of Centre County upon the filing of the account of John Blanchard and Sarah C. Brown, her executors. That such partnership and your petitioner are willing to surrender its and his property for the benefit of its and his creditors respectively except such as is exempt by law and desires to obtain the benefits of the Bankruptcy Law of 1898 as amended."

Said amended petition then sets out the residences of your petitioner and other persons named in said petition and avers that none of them are wage earners or persons engaged chiefly in farming or the tillage of the soil and as individuals owe debts which they are unable to pay in full. That there has been no final settlement of said partnership doing business as Centre County Banking Company; and there are debts of said partnership which are unsettled and unpaid amounting to more than one thousand dollars ($1000). That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts.

Said petition then sets forth that the schedules of the said John M. Shugert, individually and as represented by him, the schedules of said partnership are attached to said petition.

The prayer of said amended petition is:

"Wherefore your petitioner prays that such partnership as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner, surviving partners of Lavina Catherine Harris, deceased, may as individuals as well as said firm be adjudged bankrupt within the purview of

petitioner's motion to dismiss said amended petition in bankruptcy and erred in making the order denying the motion filed by this petitioner to dismiss said petition in bankruptcy.

Petitioner here assigns for error more particularly the several errors she believes the Court made in the order of October 20, 1922.

1. The Court erred in not sustaining the petition to dismiss upon the ground that

> Said Court was without jurisdiction upon the voluntary petition of John M. Shugert to issue a subpœna requiring this respondent to show cause why she should not be adjudged bankrupt.

2. The Court erred in not sustaining petitioner's motion to dismiss said petition for the reason

> That said Court was without jurisdiction upon the voluntary petition of said John M. Shugert to adjudicate this respondent a bankrupt.

3. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

> That an involuntary petition in bankruptcy can only be instituted against this respondent by the required number of creditors upon proof of her having committed one of the acts of bankruptcy specified in the act.

4. That the Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

> That the said Court had no jurisdiction to allow the amended petition of said John M. Shugert.

5. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That a bankruptcy proceeding cannot be instituted against a partnership by one partner where it appears upon the face of the petition that before the petition in bankruptcy was filed the partnership was dissolved by the death of one of the partners and the estate of such deceased partner is in process of administration in the Orphans' Court of the proper county.

6. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That the Bankruptcy Act confers no power or authority on one partner to file a petition in bankruptcy in the partnership name where one or more of the remaining partners do not assent or consent thereto.

7. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That so much of General Order No. VIII of the Supreme Court as attempts to confer jurisdiction upon the courts of bankruptcy to adjudicate as bankrupts non-consenting partners who refuse to join in a bankruptcy petition is legislation not authorized by the Constitution of the United States the laws thereof and is in violation thereof as to the due process clause and the equal protection of the laws clause of the Constitution of the United States.

8. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

No provision is made in the Bankruptcy Law of 1898 for the adjudication of a partnership upon the petition of one of the partners.

9. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That after a dissolution of a partnership by operation of law one of the surviving partners cannot institute bankruptcy proceedings in behalf of or against the partnership.

Wherefore your petitioner, feeling aggrieved because of such order, asks that the same may be revised in matter of law by your Honorable Court as provided in section 24b, of the Bankruptcy Law of 1898 as amended and the rules and practice in such case made is provided.

FLORENCE F. DALE,
Petitioner.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

Florence F. Dale, being duly sworn, deposes and says that the facts set forth in the foregoing petition to revise are true.

Subscribed and sworn to before me this 28th day of October, 1922. } FLORENCE F. DALE.

JANE M. GORMAN,
(Seal) *Notary Public.*
Commission expires February 11, 1925.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

October Term, 1922. No. 2946.

Florence F. Dale,
Petitioner,

v.

Centre County Banking Company, a Partnership, and John M. Shugert, Individually, Bankrupts,
Respondents.

ANSWER

TO PETITION OF FLORENCE F. DALE TO REVISE IN MATTER OF LAW DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

(Filed November 18, 1922.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The answer of JOHN M. SHUGERT, above named, to the petition of Florence F. Dale to revise in matter of law decree of the District Court of the United States for the Middle District of Pennsylvania, respectfully represents:

First.—Said decree should not be revised for the following reasons:

The original petition, together with schedules thereto attached, in bankruptcy, were filed by this respondent in the Middle District of Pennsylvania, on or about the thirtieth day of June, 1922, instead of July 11, 1922, as set forth in the petition of the said Dale, to which said petition the said Florence F. Dale on or

about the thirty-first day of July, 1922, filed an answer to the merits of said petition, denying that she was a partner of the Centre County Banking Company and raising a question of law, namely, that she could not be brought within the jurisdiction of the said Court, as a partner, or in any other relation in said proceedings. That to the answer so filed there appeared as her counsel for and on behalf of the said Florence F. Dale in said District Court, Richard L. Bigelow. That subsequent to the filing of said answer and the appearance in said court generally by herself and by her said counsel, to wit, on or about the eighteenth day of August, 1922, the said Florence F. Dale presented a petition to the said District Court, upon a motion to quash the subpœna served upon her, in pursuance to the original petition in bankruptcy filed by myself individually and on behalf of said partnership. That this respondent on or about the twenty-third day of August, 1922, filed in said District Court, a petition asking leave to amend the original petition in bankruptcy, notice of which filing was accepted by Ellis L. Orvis, attorney for Florence F. Dale, who at the same time acknowledged receipt of copy of petition for the proposed amendment. That the said Florence F. Dale filed no protest to the allowance of the amendment prayed for, nor answer thereto, as provided by Rule 32 of the General Rules of Practice for the Courts of Equity of the United States. That the said District Court heard and disposed of at the same time the motion of the said Florence F. Dale to quash the subpœna served upon her, in pursuance of the original petition in bankruptcy filed by this respondent, and the petition asking leave to amend the original petition in bankruptcy, and thereupon on the fifteenth day of September, 1922, the said Court, with reference to said motion and said amendment, made the following order:

"September 15th, 1922, after argument on the showing made and on due consideration, the Court being satisfied that the subpœna issued was not in conformity with the initial petition filed, the subpœna is quashed.

"The amendment of the original petition as now presented is allowed and the Clerk is directed to issue a subpœna as prayed for in the petition as amended.

"Service of subpœna to be made on Andrew Breeze, if personal service cannot be obtained on him, by publishing this order together with such subpœna in the *Keystone Gazette*, a newspaper published at Bellefonte, in said District, for two consecutive weeks; the last of said publication to be made on or before the 10th day of October, 1922, and by mailing copy of this order and subpœna, to the last place of abode of Andrew Breeze, to wit, Downingtown, Penna., in the Eastern District of Pennsylvania on or before the date of the first publication.

"By The Court.

"Charles B. Witmer,

"U. S. Dist. Judge."

Second.—That the said Florence F. Dale has never presented a petition to your Honorable Court for a revision as matter of law of the order and decree made by the said District Court, on the fifteenth day of September, 1922, above quoted, allowing said amendment, and under Section 8 of Rule 14 of this Court, more than thirty days having elapsed, said decree will not now be revised in this proceeding.

Third.—Because the decree of the District Court of October 20, 1922, which the said petitioner prays may be revised by your Honorable Court, was made in pursuance of a petition of the said Florence F. Dale to the said District Court, filed on or about the first day of October, 1922, wherein she prays the said Court,

upon motion, to dismiss the said petition in bankruptcy as amended and allowed by the said Court, as above stated and set aside the subpœna issued under and in pursuance of the said amended petition and served upon the said Florence F. Dale, which was an attempt on the part of the said Florence F. Dale to have the said District Court revise its former decree of September 15, 1922.

Fourth.—Because this court has no power or authority under the present proceedings to revise as a matter of law the decree of the District Court of October 20, 1922, so as in any manner to affect the prior decree made by said Court on September 15, 1922, allowing said amended petition, in pursuance of which the subpœna was served on the said Florence F. Dale, to show cause why she should not be declared a bankrupt.

Fifth.—Because the order of the District Court of October 20, 1922, so far as the same relates to the amended petition allowed by the Court, filed by this respondent, is a confirmation of the former order of said Court of September 15, 1922, allowing said amendment, and is, therefore, not subject to revision under the Bankruptcy Act, so as to annul or modify the former order made by said Court.

Sixth.—Because no hearing has yet been held by the District Court upon the question of the solvency of the Centre County Banking Company nor has it yet been determined whether or not the said Florence F. Dale is in fact a partner in said Centre County Banking Company and said decree of October 20, 1922, is not an interlocutory decree of such a definite character, as will move your Honorable Court to revise the same.

Seventh.—Because orders and decrees made by a Court of Bankruptcy, prior to an adjudication, are not of such a definite character as will prejudice the rights of an alleged bankrupt, and it is unusual and extraordinary to revise as a matter of law such order or decree.

Eighth.—Because Section 25 of the Bankruptcy Act provides for an appeal from a judgment, which may or may not adjudge the said petitioner a bankrupt, and said decree of October 20, 1922, is not such an interlocutory decree affecting her rights, as will move your Honorable Court to revise the same.

Ninth.—Because no notice was given by Florence F. Dale, the above-named petitioner, either to this respondent or his counsel, of the presentation to your Honorable Court of her petition asking for a revision as a matter of law of the decree of said District Court, and your respondent and his counsel had no notice of the same until received by the Clerk of your Honorable Court.

WHEREFORE, this respondent protests and prays the said Court to dismiss the petition of the said Florence F. Dale at her cost.

JNO. M. SHUGERT.

S. D. GETTIG,
Attorney for John M. Shugert,
11 East High Street,
Bellefonte, Pa.

N. B. SPANGLER,
Attorney for Creditors' Committee of Centre County Banking Company,
Crider's Exchange Bldg.,
Bellefonte, Pa.

STATE OF PENNSYLVANIA, }
COUNTY OF CENTRE, } *ss.:*

JOHN M. SHUGERT, the respondent mentioned and described in the foregoing answer, does hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information and belief.

Sworn and subscribed before me this 16th day of November, A. D. 1922. } JNO. M. SHUGERT.

ELIZABETH C. WALKER,
(Seal) *Notary Public.*

My commission expires March 6, 1925

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,
Bankrupts.

PETITION TO REVISE IN MATTER OF LAW.
(Filed January 6, 1923.)

To the Honorable the Judges of the Circuit Court of Appeals of the Third Circuit of the United States:

Your petitioner respectfully shows:

That one John M. Shugert on the eleventh day of July, 1922, filed a voluntary petition in bankruptcy in the District Court of the United States for the Middle District of Pennsylvania in which he set forth *inter alia* that he and others including your petitioner were partners trading as Centre County Banking Company and that he the said John M. Shugert was insolvent and that said partnership was insolvent, that said petition contained a prayer that the said Shugert and said partnership should be adjudicated bankrupt.

Thereafter the said Shugert filed an amended petition by leave of court in which it is set forth, *inter alia:*

> "That your petitioner (the said John M. Shugert) and George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze who survived Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company which partnership has had its principal place of business at the Borough of Bellefonte in the

County of Centre in said district for the greater portion of the six months immediately preceding the filing of this petition; that said partnership is insolvent and owes debts in excess of one thousand dollars ($1,000.00). That the said Lavina Catherine Harris died on or about the tenth day of January, A. D. 1921, and her estate will be administered by the Orphans' Court of Centre County upon the filing of the account of John Blanchard and Sarah C. Brown, her executors. That such partnership and your petitioner are willing to surrender its and his property for the benefit of its and his creditors respectively except such as is exempt by law and desires to obtain the benefits of the bankruptcy law of 1898 as amended."

Said amended petition then sets out the residences of your petitioner and other persons named in said petition and avers that none of them are wage earners or persons engaged chiefly in farming or the tillage of the soil and as individuals owe debts which they are unable to pay in full. That there has been no final settlement of said partnership doing business as Centre County Banking Company; and there are debts of said partnership which are unsettled and unpaid amounting to more than one thousand dollars ($1000). That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts.

Said petition then sets forth that the schedules of the said John M. Shugert individually and as represented by him, the schedules of said partnership are attached to said petition.

The prayer of said amended petition is:

"Wherefore your petitioner prays that such partnership as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner, surviving partners of Lavina Catherine Harris, deceased, may as individuals as well as said firm be adjudged bankrupt within the purview of such bankruptcy law of 1898 and that service of

this petition with a subpœna be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners and that proceedings be had as are provided in said law and General Order No. VIII of the Supreme Court and as the court may order."

That your petitioner appeared specially in answer to said subpœna and only for the purpose of moving to dismiss said amended petition in bankruptcy for the following reasons:

(A) That said court was without jurisdiction upon the voluntary petition of John M. Shugert to issue a subpœna requiring this respondent to show cause why he should not be adjudged bankrupt.

(B) That said court was without jurisdiction upon the voluntary petition of said John M. Shugert to adjudicate this respondent a bankrupt.

(C) That an involuntary petition in bankruptcy can only be instituted against this respondent by the required number of creditors upon proof of his having committed one of the acts of bankruptcy specified in the act.

(D) That the said court had no jurisdiction to allow the amended petition of said John M. Shugert.

(E) That a bankruptcy proceeding cannot be instituted against a partnership by one partner where it appears upon the face of the petition that before the petition in bankruptcy was filed the partnership was dissolved by the death of one of the partners and the estate of such deceased partner in process of administration in the Orphans' Court of the proper county.

(F) That the Bankruptcy Act confers no power or authority on one partner to file a petition in bankruptcy in the partnership name where one or more of the remaining partners do not assent or consent thereto.

(G) That so much of General Order No. VIII of the Supreme Court as attempts to confer jurisdiction upon the courts of bankruptcy to adjudicate as bankrupts non-consenting partners who refuse to join in a bankruptcy petition is legislation not authorized by the Constitution of the United States and the laws thereof and is in violation thereof as to the due process clause and the equal protection of the law clause of the Constitution of the United States.

(H) No provision is made in the Bankruptcy Law of 1898 for the adjudication of partnership upon the petition of one of the partners without the consent of all of the partners.

(I) That after a dissolution of a partnership by operation of law one of the surviving partners cannot institute bankruptcy proceedings in behalf of or against the partnership.

That after hearing argument thereon the District Court for the said Middle District made the following order therein:

"December 8, 1922. The motion to dismiss is denied.

"CHARLES B. WITMER,
"District Judge."

That said order was erroneous in matter of law in that the District Court of the United States for said Middle District of Pennsylvania, erred in not sustain-

ing petitioner's motion to dismiss said amended petition in bankruptcy and erred in making the order denying the motion filed by this petitioner to dismiss said petition in bankruptcy.

Petitioner here assigns for error more particularly the several errors he believes the Court made in the order of October 20, 1922.

1. The Court erred in not sustaining the petition to dismiss upon the ground that

> Said Court was without jurisdiction upon the voluntary petition of John M. Shugert to issue a subpœna requiring this respondent to show cause why he should not be adjudged bankrupt.

2. The Court erred in not sustaining petitioner's motion to dismiss said petition for the reason

> That said Court is without jurisdiction upon the voluntary petition of said John M. Shugert to adjudicate this respondent a bankrupt.

3. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

> That an involuntary petition in bankruptcy can only be instituted against this respondent by the required number of creditors upon proof of his having committed one of the acts of bankruptcy specified in the act.

4. That the Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

> That the said Court had no jurisdiction to allow the amended petition of said John M. Shugert.

5. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That a bankruptcy proceeding cannot be instituted against a partnership by one partner where it appears upon the face of the petition that before the petition in bankruptcy was filed the partnership was dissolved by the death of one of the partners and the estate of such deceased partner is in process of administration in the Orphans' Court of the proper county.

6. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That the Bankruptcy Act confers no power or authority on one partner to file a petition in bankruptcy in the partnership name where one or more of the remaining partners do not assent or consent thereto.

7. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That so much of General Order No. VIII of the Supreme Court as attempts to confer jurisdiction upon the courts of bankruptcy to adjudicate as bankrupts non-consenting partners who refuse to join in a bankruptcy petition is legislation not authorized by the Constitution of the United States the laws thereof and is in violation thereof as to the due process clause and the equal protection of the laws clause of the Constitution of the United States.

8. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

No provision is made in the Bankruptcy Law of 1898 for the adjudication of a partnership upon the petition of one of the partners.

9. The Court erred in not sustaining the petitioner's motion to dismiss the said petition for the reason

That after a dissolution of a partnership by operation of law one of the surviving partners cannot institute bankruptcy proceedings in behalf of or against the partnership.

Wherefore your petitioner feeling aggrieved because of such order asks that the same may be revised in matter of law by your Honorable Court as provided in Section 24b of the Bankruptcy Law of 1898 as amended and the rules and practice in such case made is provided.

ANDREW BREESE,
Petitioner.

M. C. RHONE,
Attorney for Petitioner.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } *ss.:*

Andrew Breese, being duly sworn, deposes and says, that the facts set forth in the foregoing petition to revise are true.

Subscribed and sworn to before me this 18th day of December, 1922. } ANDREW BREESE.

DUDLEY R. JANVIER,
(Seal) *Notary Public of New Jersey.*

1923, January 16. Leave granted to file this petition, without to respondent to receive at this hearing the question or matter they oppose to this petition.

WOODBY,
Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY. No. 4268.

In the Matter of the Centre County Banking Company, a Partnership, and John M. Shugert, Individually,

Bankrupts.

ANSWER TO PETITION TO REVISE IN THE MATTER OF ANDREW BREEZE.

(Filed January 8, 1923.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your respondent in answer to the petition of Andrew Breeze to revise in matter of law a decree of the District Court of the United States for the Middle District of Pennsylvania, respectfully shows:

That it is true, as set forth, that a petition was filed in bankruptcy by this respondent, on behalf of the Centre County Banking Company and its members or partners on the eleventh day of July, 1922, as set forth in the petition to revise.

That it is also true that said petition was amended by leave of Court, but the amendment, as set forth in the petition of Andrew Breeze to revise, is not correct. That two paragraphs were added to the original petition to amend, the one to the body of the petition, and the other, the prayer, which said paragraphs are as follows:

> "That there has been no final settlement of the partnership business of said partners, doing business as the Centre County Banking Company; and there are debts of said partnership, which are

unsettled and unpaid, amounting to more than One Thousand Dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

"WHEREFORE, your petitioner prays that such partnership, as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze, and your petitioner, surviving partners of Lavinia Catherine Harris, deceased, may each individually, as well as said firm, be adjudged bankrupt within the purview of such Bankruptcy Law of 1898, as amended, and that service of this petition, with a subpœna, be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings be had as are provided in said law and General Order VIII of the Supreme Court, and as the Court may order."

That a copy of the petition as amended by the District Court is hereto attached and made a part hereof, and marked "Respondent's Exhibit 'A.'"

That subsequent to the amendment of said petition as originally filed, the same was docketed in the District Court as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

In the Matter of John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze, surviving partners of Lavina Catherine Harris, deceased, individually, and trading as Centre County Banking Company.	No. 4268 IN BANKRUPTCY."

That in pursuance of said amended petition a subpœna was regularly issued by the District Court and constructive service had upon the said Andrew Breeze,

by advertisement, as required by law and the rules of said Court, and upon due proof of same, the order of December 8, 1922, complained of, was made by the District Court. That such constructive service was had for the reason that the said Andrew Breeze is not a resident of the Middle District of Pennsylvania and was not at the time of the filing of the petition in bankruptcy, and his actual residence is not known to your petitioner, although he appeared specially in this proceeding.

Your respondent denies that the reasons filed by him in his petition to revise, indicated by the letters A, B, C, D, E, F, G, H and I, are good in law, and avers that the said petition should be dismissed.

This respondent further avers that the further reasons filed by the said Andrew Breeze on its petition to revise as a matter of law, numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9, are not good in law, and that the said Court should dismiss the said petition for the following reasons, to wit:

First.—Because there has been no order made by the District Court adjudicating or refusing to adjudicate the Centre County Banking Company, and the copartners composing the same, bankrupts, and the said petitioner will not be prejudiced in any manner by the dismissal of this petition, for the reason that the same questions here raised by him can be raised and adjudicated by this Court on appeal, in case the District Court should hereafter by order or decree adjudge the said Andrew Breeze a bankrupt as a copartner of the Centre County Banking Company.

Second.—Because the United States Circuit Court of Appeals will not hear a petition to revise an interlocutory decree, where the same question can later be raised without prejudice to the petitioner.

Third.—Because the said Court will not revise as matter of law an interlocutory decree where the same does not prejudice the rights of the petition and where the same question can properly be raised on a subsequent appeal in the same proceeding.

Fourth.—Because a petition to revise an order in a bankruptcy proceeding, made prior to an adjudication of bankruptcy or a refusal of an adjudication in bankruptcy, is almost an unheard of proceeding and is unusual and without authority of law.

WHEREUPON, this respondent prays the said Court that the said petition to revise, filed by the said Andrew Breeze, be dismissed at the costs of the petitioner, and that such other and further order in the premises may be made as to justice and equity may appertain.

JNO. M. SHUGERT.

STATE OF PENNSYLVANIA, } *ss.:*
COUNTY OF CENTRE, }

Before me, a notary public in and for said State and County, personally appeared JOHN M. SHUGERT, the respondent above named, who being duly sworn according to law, doth depose and say that the facts set forth in the foregoing answer are true and correct to the best of his knowledge, information and belief.

Sworn and subscribed before me this 5th day of January, A. D. 1923. } JNO. M. SHUGERT.

ELIZABETH C. WALKER.
(Seal) *Notary Public.*

My commission expires March 6, 1925.

RESPONDENT'S EXHIBIT "A."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

In the Matter of the Centre County Banking Company, a partnership, and John M. Shugert, individually,
Bankrupts.

No. 4268
IN BANKRUPTCY.

To the Honorable Charles B. Witmer, Judge of the District Court of the United States for the Middle District of Pennsylvania:

The petition of John M. Shugert of the Borough of Bellefonte, in the County of Centre, in said district, of the occupation of private banking, respectfully shows:

That your petitioner and George R. Meek, Mary C. Harris, Florence F. Dale, and Andrew Breeze, who survived Lavinia Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, which partnership has had its principal place of business at the Borough of Bellefonte, in the County of Centre, in said District, for the greater portion of the six months immediately preceding the filing of this petition; and that said partnership is insolvent and owes debts in excess of one thousand dollars ($1000). That the said Lavinia Catherine Harris died on or about the tenth day of January, A. D. 1921, and her estate will be administered by the Orphans' Court of Centre County upon the filing of the account of John Blanchard and Sarah C. Brown, her executors.

That such partnership and your petitioner are willing to surrender its and his property for the benefit of

its and his creditors, respectively, except such as is exempt by law, and desire to obtain the benefits of the bankruptcy law of 1898, as amended.

That the said George R. Meek, whose residence is in the Borough of Bellefonte, in the middle district of Pennsylvania, Mary C. Harris, whose residence is in the said Borough, in said district, Florence F. Dale, whose residence is in the City of Hazleton, in the eastern district of Pennsylvania, and Andrew Breeze, whose residence is in the Borough of Downingtown, in the eastern district of Pennsylvania, have not offered to join in said petition nor is your petitioner informed of their intention in said matter; that said parties are neither wage earners nor persons engaged chiefly in farming or the tillage of the soil, and as individuals owe debts which they are unable to pay in full.

That there has been no final settlement of the partnership business of said partners, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than One Thousand Dollars. That each of said partners is insolvent, and they are jointly or severally unable to pay said partnership debts.

That the schedule hereto annexed marked A, and verified by your petitioner's oath, contains a full and true statement of all the debts of said partnership, and (so far as it is possible to ascertain) the names and residences of its creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked B, and verified by your petitioner's oath, contains an accurate inventory of all of the property of said partnership, both real and personal, and such further statements concerning said property as are required by said law.

That the schedule hereto annexed marked C, and verified by the oath of your petitioner contains a full

and true statement of all of his individual debts, and (so far as it is possible to ascertain) the names and places of residence of his individual creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked D, and verified by the oath of your petitioner contains an accurate inventory of all of his individual property, both real and personal, and such further statements concerning said property as is required by said law.

Wherefore, your petitioner prays that such partnership, as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze, and your petitioner, surviving partners of Lavinia Catherine Harris, deceased, may each individually, as well as said firm, be adjudged bankrupt within the purview of such bankruptcy law of 1898, as amended, and that service of this petition, with a subpœna, be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings be had as are provided in said law and General Order VIII of the Supreme Court, and as the Court may order.

JNO. M. SHUGERT,
Petitioner.

S. D. GETTIG,
Attorney for Petitioner.
Bellefonte, Pa.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA, } *ss.:*

I, John M. Shugert, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

Subscribed and sworn to before me this 22nd day of Aug., 1922. } JNO. M. SHUGERT.

ELIZABETH C. WALKER.
(Seal) *Notary Public.*

My commission expires March 6, 1925.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1923

No. 2945 (List No. 6)

GEORGE R. MEEK, Petitioner,

vs.

CENTRE COUNTY BANKING CO. et al., Bankrupts, Respondents

ORDER ASSIGNING JUDGE—Filed March 7, 1923

Petition from the District Court of the United States for the Middle District of Pennsylvania

And now, to-wit this seventh day of March A. D. 1923, it is ordered that Hon. Charles L. McKeehan, District Judge for the Eastern District of Pennsylvania, be, and he is hereby assigned to sit in above case in order to make a full court.

Per Curiam.

Buffington, Circuit Judge.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1923

No. 2946 (List No. 7)

FLORENCE F. DALE, Petitioner,

vs.

CENTRE COUNTY BANKING CO. et al., Bankrupts, Respondents

ORDER ASSIGNING JUDGE—Filed March 7, 1923

Petition from the District Court of the United States for the Middle District of Pennsylvania

And now, to-wit this seventh day of March A. D. 1923, it is ordered that Hon. Charles L. McKeehan, District Judge for the Eastern District of Pennsylvania, be, and he is hereby assigned to sit in above case in order to make a full court.

Per Curiam.

Buffington, Circuit Judge.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1923

No. 2971

ANDREW BREEZE, Petitioner,

vs.

CENTRE COUNTY BANKING Co. et al., Bankrupts, Respondents

ORDER ASSIGNING JUDGE—Filed March 7, 1923

Petition from the District Court of the United States for the Middle District of Pennsylvania

And now, to-wit this seventh day of March A. D. 1923, it is ordered that Hon. Charles L. McKeehan, District Judge for the Eastern District of Pennsylvania, be, and he is hereby assigned to sit in above case in order to make a full court.

Per Curiam.

Buffington, Circuit Judge.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 2945, March Term, 1923

GEORGE R. MEEK

vs.

CENTRE COUNTY BANKING Co. et al.

No. 2946, March Term, 1923

FLORENCE F. DALE

vs.

CENTRE COUNTY BANKING Co. et al.

No. 2971, March Term, 1923

ANDREW BREEZE

vs.

CENTRE COUNTY BANKING Co. et al.

ARGUMENT AND SUBMISSION

And afterwards, to wit, on the 7th day of March, 1923, come the parties aforesaid by their counsel aforesaid, and this case being called

for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis, Circuit Judge, and Honorable Charles L. McKeehan, District Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 20th day of August, 1923 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 2945, March Term, 1923

GEORGE R. MEEK

vs.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUBERT, Individually, Bankrupts

No. 2946, March Term, 1923

FLORENCE F. DALE

vs.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts

No. 2971, March Term, 1923

ANDREW BREEZE

vs.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts

Petitions for Review from the District Court of the United States for the Middle District of Pennsylvania

Before Buffington and Davis, Circuit Judges, and McKeehan, District Judge

OPINION—Filed August 20, 1923

DAVIS, Circuit Judge: All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre

County Banking Company: Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Center County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpœnas on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Center County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5a and c, of the Act of 1898 provides that:

(a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

"Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same menner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not to voluntary petitions in bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary

petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership * * * may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires us to hold that it did. If the Act of 1898 had provided that "a partnership * * * may be adjudged a bankrupt" on the petition of "any creditor", this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "anyone" of the partners, and by "any creditor." The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that: "Any member of a partnership who refuses to join in the petition * * * shall be entitled to resist the prayer" etc. By the words "join in," the Supreme Court had in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in." Judge Lowell held in the case of In re Forbes et al., 128 Fed. 137, 140, that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis v. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong v. Fisher, et al., 224 Fed. 97; Francis v. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth v. Slipper et al., 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being Administered in the Probate Court of Center County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question." Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not

be made impossible because one of the partners is dead. Vaccaro et al. v. Security Bank of Memphis et al., 130 Fed. 436, 442. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts, it will be turned over to the bankruptcy court. In re Stem & Co., 127 Fed. 547. The order appealed from is

Affirmed.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1923

No. 2945 (List No. 6)

GEORGE R. MEEK, Petitioner,

vs.

CENTRE COUNTY BANKING CO. et al., Bankrupts, Respondents

Appeal from the District Court of the United States for the Middle District of Pennsylvania

JUDGMENT—Filed August 20, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States for the Middle District of Pennsylvania was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, August 20, 1923.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1923

No. 2946 (List No. 7)

FLORENCE F. DALE, Petitioner,

vs.

CENTRE COUNTY BANKING Co. et al., Bankrupts, Respondents

Appeal from the District Court of the United States for the Middle District of Pennsylvania

JUDGMENT—Filed August 20, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, August 20, 1923.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1923.

No. 2971 (List No. 8)

ANDREW BREEZE, Petitioner,

vs.

CENTRE COUNTY BANKING Co. et al., Bankrupts, Respondents

Appeal from the District Court of the United States for the Middle District of Pennsylvania

JUDGMENT—Filed August 20, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States for the Middle District of Pennsylvania was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, August 20, 1923.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this Court in the cases of:

Geo. R. Meek vs. Centre County Banking Co., et al., No. 2945;
Florence F. Dale vs. " " " " " " No. 2946;
Andrew Breeze vs. " " " " " " No. 2971,

on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 26th day of September, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States the one hundred and forty-eighth.

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal of the United States Circuit Court of Appeals, Third Circuit.)

UNITED STATES OF AMERICA, ss:

WRIT OF CERTIORARI AND RETURN—Filed December 31, 1923

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which George R. Meek is petitioner, and Centre County Banking Company, Partnership, and John M. Shugert, Individually, Bankrupts, are respondents, No. 2945, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to review an order of the District Court of the United States for the Middle District of Pennsylcania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION

It is hereby stipulated that the transcript of the record in the above stated case now on file in the Supreme Court of the United States shall stand as the return to the writ of certiorari allowed by the Supreme Court October 22, 1923.

M. C. Rhone, Ellis L. Orvis, Harry Keller, Attorneys for Petitioner. N. B. Spangler, Attorney for Creditors Committee; S. D. Gettig, Attorney for John M. Spangler, Attorneys for Respondents.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel for return to writ of certiorari in the case of George R. Meek, Petitioner, vs. Centre County Banking Co. et al., Bankrupts, Respondents, No. 2945, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 29th day of December in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eighth.

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal of the United States Circuit Court of Appeals, Third Circuit.)

[File endorsement omitted.]

WRIT OF CERTIORARI AND RETURN—Filed December 31, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Florence F. Dale is petitioner, and Centre County Banking

Company, a Partnership, and John M. Shugert, Individually, Bankrupts, are respondents, No. 2946, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to review an order of the District Court of the United States for the Middle District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION

It is hereby stipulated that the transcript of the record in the above stated case now on file in the Supreme Court of the United States shall stand as the return to the writ of certiorari allowed by the Supreme Court October 2, 1923.

M. C. Rhone, R. L. Bigelow, Ellis L. Orvis, Harry Keller, Attorneys for Petitioner. N. B. Spangler, Attorney for Creditors' Committee; S. D. Gettig, Attorney for John M. Spangler, Attorneys for Respondents.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel for return to writ of certiorari in the case of Florence F. Dale, Petitioner, vs. Centre County Banking Co., et al., Bankrupts, Respondents, No. 2946, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 29th day of December, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eighth.

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal of the United States Circuit Court of Appeals, Third Circuit.)

[File endorsement omitted.]

WRIT OF CERTIORARI AND RETURN—Filed December 31, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Andrew Breeze is petitioner, and Centre County Banking Company, a Partnership, and John M. Shugert, Individually, Bankrupts, are respondents, No. 2971, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to review an order of the District Court of the United States for the Middle District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION

It is hereby stipulated that the transcript of the record in the above stated case now on file in the Supreme Court of the United States shall stand as the return to the writ of certiorari allowed by the Supreme Court October 22, 1923.

M. C. Rhone, Ellis L. Orvis, Harry Keller, Attorneys for Petitioner. N. B. Spangler, Attorney for Creditors' Committee; S. D. Gettig, Attorney for John M. Spangler, Attorneys for Respondents.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel for return to writ of certiorari in the case of Andrew Breeze, Petitioner, vs. Centre County Banking Co., et al., Bankrupts, Respondents, No. 2971, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed by name and affixed the seal of the said Court, at Philadelphia, this 29th day of December, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eighth.

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal of the United States Circuit Court of Appeals, Third Circuit.)

[File endorsement omitted.]

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In re Stem & Company, 127 Fed. 547

Section 5, of the Bankruptcy Act of 1898

General Order No. VIII, promulgated by the Supreme Court

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1923

GEORGE R. MEEK *Petitioner,* *vs* CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts. *Respondents.*	Notice of Motion, Docket No.

To N. B. SPANGLER,
S. D. GETTIG,
Bellefonte, Pa.

Attorneys for Centre County Banking Company and John M. Shugert, Respondents:

Gentlemen:

Please take notice that upon a certified copy of the transcript of record in the above stated case, including the proceedings had in the Circuit Court of Appeals for the 3rd Circuit, and upon the annexed petition of George R. Meek, sworn to on the 11th day of September, 1923, we shall make the motion hereto annexed before the Supreme Court of

the United States at the Capitol in the City of Washington on the 8th day of October, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Yours, Etc.,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.
Attorneys for Petitioner.

AND NOW September 11th, 1923, we hereby accept service of the above notice and annexed petition.

N. B. SPANGLER,
Atty for Creditors' Committee.

S. D. GETTIG,
Atty for John M. Shugert, et al.

GEORGE R. MEEK
Petitioner,
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts,
Respondents.

Motion for Certiorari.

And now comes the petitioner, George R. Meek, by his counsel, Mortimer C. Rhone (with him Ellis L. Orvis and Harry Keller) duly admitted to practice in the Supreme Court of the United States, and moves your Honorable Court upon a certified copy of the transcript of the record in the above stated case, including the proceedings had in the Circuit Court of Appeals of the United States for the 3rd Circuit and upon the annexed petition sworn to on the 11th day of September, 1923, for a writ of certiorari directed to the Circuit Court of Appeals of the United States for the 3rd Circuit, and to the District Court of the United States for the Middle District of Pennsylvania, to bring before your Honorable Court the case of George R. Meek, petitioner, vs. Centre County Banking Company, a partnership and John M. Shugert, individually, bankrupts No. 2945, March Term, 1923, in the Circuit Court of Appeals of the United States for the 3rd Circuit recently decided by said Circuit Court of Appeals, and by the District Court of the United States for the Middle District of Pennsylvania, for such proceed-

ings therein as to this Court may seem just, and for such other further relief in the premises as may be just.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.
Counsel for Petitioner.

GEORGE R. MEEK
Petitioner

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.
Respondents.

Petition for Writ of Certiorari.

TO THE HONORABLE,

THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of George R. Meek respectfully represents as follows:

FIRST: That heretofore, to wit on August

26th, 1922, the said John M. Shugert filed in the District Court of the United States for the Middle District of Pennsylvania, Docket No. 4268, an amended involuntary petition in bankruptcy (see record page 56) wherein he averred inter alia that he as an individual was insolvent; that the Centre County Banking Company, a partnership composed of himself, George R. Meek, Florence F. Dale, Andrew Breeze, Mary Harris, then living and Lavina Katherine Harris, then deceased, was likewise insolvent, and that each of said partners were insolvent and jointly and severally unable to pay the partnership debts; that the estate of Lavina Katherine Harris, a former partner, who died January 10, 1921, was in the custody of the Orphans' Court of Centre County, and of which estate John Blanchard and Sarah C. Brown were her executors.

The prayer of the petition is

> "That such partnership as well as Geo. R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt within the purview of such bankruptcy law of 1898 as amended, and that service of this petition be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings may be had as are provided in said law and General Order VIII, of the Supreme Court as the Court may order."

SECOND: That your petitioner moved to dismiss the said petition in bankruptcy upon grounds stated therein (record 65).

A. That the District Court was without jurisdiction to allow or determine an involuntary petition

in bankruptcy against this petitioner filed by the said John M. Shugert.

B. That an involuntary petition in bankruptcy could only be filed and prosecuted by the required number of creditors and that only upon a proper averment that the petitioner had committed one or more of the several acts of bankruptcy defined in the Bankruptcy Act.

C. That the original petition filed by Shugert was a voluntary one on his part and the amended petition being a combination voluntary and involuntary petition the amendment was improperly allowed.

D. That where it appears upon the record that prior to the filing of a petition in bankruptcy by a surviving partner that the partnership was dissolved by operation of law by the death of one of the partners, and whose Estate was then in process of administration in the Probate Court, a surviving partner could not institute bankruptcy proceedings against the partnership.

E. That in the Bankruptcy Act of 1898 one partner cannot without the consent of his other partners institute bankruptcy proceedings to have the partnership declared bankrupt.

F. That insofar as General Order No. VIII of the Supreme Court of the United States attempts to confer jurisdiction upon Courts of Bankruptcy to adjudicate as bankrupts non-consenting partners, who refuse to join in a bankruptcy petition instituted by one partner, said General Order is in effect legislation at variance with the statute itself, and the enforcement of such order against your petitioner would be denying him the equal protection of the laws and amount to the taking of his property without due process of law.

THIRD: After argument had upon the motion to dismiss the Honorable Charles B. Witmer District Judge allowed the amended petition to be filed and directed a subpoena to issue as prayed for therein, and a subpoena was issued and served upon your petitioner (record 60) requiring him "to answer a petition filed by John M. Shugert in our said Court praying that you may be adjudged a bankrupt and to do further and receive that which our said District Court shall consider in your behalf."

FOURTH: The petitioner after this subpoena was issued appeared specially and for the purpose only of quashing the subpoena and to dismiss the amended petition upon the grounds above stated, which motions were denied by the District Court, and a petition to revise in matter of law was filed in the Circuit Court of Appeals, and that Court in an opinion by Judge Davis affirmed the order of the District Court. See opinion, page 42.

FIFTH: As the record now stands the District Court of the United States for the Middle District of Pennsylvania and the Circuit Court of Appeals for the 3rd Circuit have decided the following propositions of law which will be hereafter binding in the 3rd circuit at least, unless application for this writ of certiorari shall be granted and the orders so made reversed by the Supreme Court:

A. That one partner may without the consent and against the protest of the other partners institute and prosecute a bankruptcy proceeding against the partnership.

B. That one partner may maintain an involuntary petition in bankruptcy against his other partners without setting forth therein any of the Acts of

Bankruptcy defined in the statute, and notwithstanding the terms of the statute, which provide that only creditors may maintain involuntary bankruptcy proceedings.

C. That a surviving partner may institute bankruptcy proceedings to have the partnership declared bankrupt even where it appears upon the face of the petition so filed that several months prior thereto the partnership was dissolved by operation of law, viz., the death of one of the partners, and such partner's Estate is then being administered in the State Probate Court.

D. That the authority of the above propositions of law upon which the decision of the Circuit Court of Appeals and the District Court was founded, is General Order No. VIII promulgated by the Supreme Court after the passage of the Act of 1898, and which order is in almost identical language with that of General Order No. 18 made after the passage of the Act of 1867, which Act expressly provided that one partner might file a petition to have the partnership adjudged a bankrupt.

SIXTH: Your petitioner contends that the District Court and the Circuit Court of Appeals erred in refusing to quash the subpoena and dismiss the petition in bankruptcy vs. your petitioner and the partnership and that the decision of both Courts is at variance with the provisions of the bankruptcy statute, and of the following decisions of the Federal Courts upon the questions which Federal Courts have passed upon that are raised in this record, viz.,

Arthur vs. Cumming 91 U. S. 362.
Hobbs vs. McLean 117 U. S. 567.
25 Corpus Juris, note 17 (c) page 220.

Deckert vs. Filbert 3 W & S 454.
Hall vs. Lanning 91 U. S. 160; 23 L. E. 271.
Yonley vs. Lavender 88 U. S. 276; 22L E. 536.
In re Fackleman 41 A. B. R. 14; 248 Fed. 565.
In re Evans 20 A. B. R. 406; 16 Fed. 590.
In re Temple Fed. Cases No. 1-13825 and recorded in Vol. 23, Fed. cases at page 835.

Whereas the Circuit Court of Appeals and the District Court held that the case at bar is ruled by the following authorities.

Section 5 of the Bankruptcy Act of 1898.

General Order No. VIII promulgated by the Supreme Court.

In re Forbes et al, 128 Fed. 137-140.
Francis vs. McNeal 228 U. S. 695.
Armstrong vs. Fisher et al 224 Fed. 227.
Yungbluth vs. Slipper et al 185 Fed. 773.
Vaccaro et al vs. Secretary Bank of Memphis 130 Fed. 436-442.
In re Stem & Company 127 Fed. 547.

SEVENTH: That the questions that your petitioner desires among other things to have decided in this Court are as stated in the brief filed in the Circuit Court of Appeals as follows:

1. "Jurisdiction of the Bankruptcy Court to issue a subpoena upon the voluntary petition of one partner requiring remaining partners to show cause why they should not be adjudicated bankrupts individually.

2. Jurisdiction of the Bankruptcy Court to adjudicate a partnership bankrupt upon the sole

petition of one partner without the consent or assent of remaining partners.

3. Jurisdiction of the Bankruptcy Court to hear and determine a petition in bankruptcy filed by one partner to have the partnership adjudicated a bankrupt without consent or assent of remaining partners, where it appears upon the face of the petition that one of the alleged partners' Estate is then being administered in the Orphans' Court.

4. Scope of, and interpretation of the provisions of General Order No. VIII as applied to the case at bar."

EIGHTH: Herewith filed is the certified transcript of the record of the proceedings in the Circuit Court of Appeals for the 3rd Circuit and in the District Court of the United States for the Middle District of Pennsylvania, together with certified copies of the opinions of said Courts and of the order made by said Circuit Court of Appeals affirming the judgment of the District Court.

WHEREFORE your petitioner prays your Honorable Court to issue a writ of certiorari to the Circuit Court of Appeals of the United States for the 3rd Circuit, and the District Court of the United States for the Middle District of Pennsylvania, to send up the record in said case to the end that the manifold errors herein complained of may be corrected, and the order made by each of said courts be reversed and the petition to revise in matter of law

granted, and for such other and further relief as to your Honorable Court may seem just.

GEORGE R. MEEK

MORTIMER C. RHONE,
Williamsport, Pa.
ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.
Attorneys for Petitioner.

Dated at Bellefonte, Pa., September 11th, 1923.

State of Pennsylvania
County of Centre ss

George R. Meek being duly sworn deposes and says that he has read the foregoing petition and knows the facts therein set forth and the same are true to the best of his knowledge, information and belief, and that he believes them to be true.

GEORGE R. MEEK,

Sworn and subscribed to before me this 11th day of September, 1923.

BELLE WEAVER,
Notary Public.
My Commission expires February 2nd, 1925.
(SEAL)

SUPREME COURT OF THE UNITED STATES
OF AMERICA
October Term, 1923.

GEORGE R. MEEK
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.
Petitioner's Brief

STATEMENT OF THE CASE.

John M. Shugert filed a petition in bankruptcy in the Middle District of Pennsylvania in which he sets forth that he individually is insolvent and that he "George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze who survive Lavina Katherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, with its principal place of business at Bellefonte, Pa.," and that the partnership is likewise insolvent. He further avers that "Lavina Katherine Harris who in her lifetime was a partner died on the 10th day of January, 1921, and that her estate is now being administered" in the Orphans' Court of Centre County, Pa. This original petition filed the 30th day of June, 1922, prayed

for a subpoena which was awarded and served upon the surviving other partners. That the petitioner and his co-respondents moved to quash and set aside the said subpoena upon the grounds, inter alia, that it was not responsive to the prayer of the petitioner in that it required the remaining living partners to show cause why each of them should not be individually adjudicated a bankrupt.

This motion to quash and dismiss was sustained in the District Court. But on the same day the petitioner (Shugert) was allowed to amend his original petition so as to read as follows:

> "Such partnership as well as the said George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt * * * * that service of the petition, together with a subpoena be made upon the said George R. Meek, and other respondents, and that proceedings be had as provided in the Bankruptcy Act and General Order No. VIII."

About the same time, or shortly thereafter, the District Court appointed Ivan Walker Esq., Temporary Receiver of the partnership, so that said partnership assets are now being collected and conserved.

Following the filing of this amended petition a subpoena was issued (record 60) addressed "to George R. Meek, Mary C. Harris, Florence F. Dale

and Andrew Breeze, surviving partners of Lavina Katherine Harris, deceased, individually and trading as Centre County Banking Company," by the terms of which each of said individuals is required to appear to answer the petition filed by Shugert and **show cause why they as individuals** should not be adjudged bankrupts, and why said partnership should not be adjudged bankrupt.

George R. Meek, Florence F. Dale and Andrew Breeze filed their several motions to dismiss this amended petition and quash the subpoena for reasons set forth in the motion (record 65), this motion having been filed October 3, 1922.

The District Court without an opinion, denied the motion to dismiss, whereupon these three petitioners presented a petition to the Circuit Court of Appeals for the 3rd Circuit to revise the order of the District Court, and after argument thereon the Circuit Court of Appeals affirmed the order of the Court below, and these petitioners now ask this Court to issue a writ of certiorari to the Circuit Court of Appeals and the District Court to correct the errors complained of in the motion and brief filed.

Several questions of law are raised by the record that are novel, of wide public interest, and never heretofore analytically discussed and determined by this Court. So far as we can ascertain some of them have never been raised. There is a conflict of authority in the lower courts upon all these questions. As to the one involved by the death of Lavina

Katherine Harris upon the jurisdiction of the bankruptcy courts, an apparent conflict of authorities is admitted in the opinion of his Honor Judge Davis of the Circuit Court of Appeals.

So far as our search goes among the reported cases no partner has anywhere asked that his non-assenting co-partners shall be declared **individually** bankrupt, at least there is no authoritative decision that he may lawfully do so especially when he fails to aver that he is a creditor of the said remaining partners.

The questions involved are not only unique and novel because of their intrinsic importance and the lack of direct authoritative rulings thereon, but are rendered much more so by the attempt to combine in one procedure a voluntary bankruptcy with the involuntary bankruptcy both of the partnership itself and of the resisting surviving partners, and that too, without the intervention of a single creditor either of the petitioner, the partnership, or of the remaining members of the partnership.

But this does not state the whole of the complex problem thus created because the record further shows the additional complication caused by the prior death of Lavina Katherine Harris, thereby creating a conflict of jurisdiction between the Pennsylvania Probate Court, which has exclusive jurisdiction over the estates of decedents, and the Federal Court sitting in bankruptcy.

POINTS

I

THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS BY THE DECISION IN THIS CASE HOLD THAT ONE PARTNER MAY WITHOUT THE CONSENT AND AGAINST THE PROTEST OF HIS OTHER PARTNERS INSTITUTE AND PROSECUTE A BANKRUPTCY PROCEEDING AGAINST THE PARTNERSHIP.

These petitioners contend that there is no authority in the Bankruptcy Act of 1898 or the amendments thereto which will warrant any such proceeding because there is no statutory authority for it. Bankruptcy proceedings are in derogation of the common law and the provisions of such acts of the Legislature are to be strictly construed.

The Bankruptcy Act of 1867 specifically authorized the filing of a voluntary petition by any one of the partners. The language in that Act being, Section 36.

> 'Where two or more persons who are partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them or on the petition of any creditor of the partners, a warrant shall issue, etc.'

Since Congress in the Act of 1867 expressly provided that a voluntary bankruptcy proceeding by the partnership might be instituted by any one of

the partners and did not in the Act of 1898 incorporate any such provisions, under well known rules for the interpretation of statutes, the presumption is that Congress intentionally omitted this provision, and having omitted it no such power is conferred by the Act of 1898.

There is no reason to assume that Congress omitted the 36th Section of the Act of 1867 from the present Bankrupt Act of 1898 by mistake or oversight. There is obviously a change in the legislative policy; caused by the numerous decisions in the federal courts criticising the unfortunate results arising from the presence of Section 36 in the older Act. It was recognized that the practice under said Section opened an easy door to rapacious and designing persons to oppress and harass their partners; besides in too many instances it made the bankruptcy practice intricate and cumbersome by reason of the collateral issues of law and fact thus introduceable.

The maxim borrowed from the Roman law *expressio unius est exclusio alterius* is so universally accepted as "A well settled legal maxim" and "The well establishd principle or maxim of law," and "As that universal and familiar rule" and "A rule both of law and equity," and "The well known maxim of construction and a very sound one;" that it would be an affectation to quote any of the multiplicity of authorities whether Federal, State, or of the English Courts.

We will limit ourselves to apply this maxim in

discussing the inclusion of Clause 36 in the earlier statute and its exclusion or any provision analagous thereto from the present bankrupt act.

"No maxim of the law is of more general and uniform application and it is never more applicable than in the construction and interpretation of statutes;" and "The maxim was never more applicable than when applied to the interpretation of a statute that *expressio unius est exclusio alterius.*"

Broom's Legal Maxims, 8th Edition, page 663.

We must bear in mind that the Act of 1898 was not a repeal, amendment or a supplement to the Act of 1867, for that Act had expired by its own limitations; however much of its provisions were reincorporated in the present legislation, and the rejection of Section 36 emphasizes the reason for applying the maxim above quoted and indeed necessitates its application.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

25 Corpus Juris note "17 (c)" page 220.

State vs. Tucson Gas Company, 15 Arizona, 294.

New Haven vs. Whitney, 36 Conn., 374.

Township vs. Dubuque, 7 Iowa, 262.

Scott vs. Ford, 52 Or., 288.

While the Act of 1898 as just above stated has

not repealed the earlier Act of Congress, it is in fact a recodification, and its failure to include either Section 36 of the Act of 1867 or any similar provision implies in the strongest manner a negative.

"Possibly the strongest implication of a negative is found where subsequent statutes revise the whole matter of former ones."

Endlich on the Interpretation of Statutes, page 270.

So Mr. Justice Swain in delivering the opinion of the Supreme Court of the United States upon the construction of a revenue statute ruled that "The maxim *expressio unius est exclusio alterius* applies with cogent effect. This view is conclusive unless it is overcome by something else found in the statute."

Arthur vs. Cumming, 91 U. S. 362.

As Congress in 1898 refused to enact that "Partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them, a warrant shall issue," and the statute under which we are now living entirely omits any proceeding in bankruptcy by one partner against another, how can it be argued that our present legislation on bankruptcy provides for a procedure such as we have at bar, though formerly authorized by a statute now defunct, but expressly excluded from the Act of 1898? All the powers of the bankrupt court, all procedures to be followed therein are of statu-

tory origin and all its jurisdiction rests exclusively upon the statute of 1898 alone.

Hobbs vs. McLean, 117 U. S. 567.

The Supreme Court in the case of Hobbs vs. McLean 117 U. S. 567; 29 L. E. 940, said upon this question:

'Where a provision is left out of a statute either by design or by mistake of the legislator, the Courts have no power to supply it. To do so would be to legislate and not to construe.' "

II

POWER AND AUTHORITY OF PARTNERS.

The fundamental law relating to partnership in force throughout the United States and the rule in the Federal Courts is that:

> Unless authorized by the other partners or unless they have abandoned the business one or more but less than all the partners have no authority to—
>
> (A) Assign the partnership property in trust for creditors on the assignee's promise to pay the debts of the partnership.
>
> (B) Dispose of the good will of the business.
>
> (C) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(D) Confess a judgment.

(E) Submit a partnership claim or liability to arbitration or reference.

The Supreme Court of Pennsylvania many years ago decided in Dickert vs. Filbert 3 W. & S. 454 that one partner after the dissolution of partnership has no power to make a voluntary assignment of the effects of the partnership for the benefit of creditors without the consent of his co-partners.

The Supreme Court of the United States in Hall vs. Lanning 91 U. S. 160; 23 L. E. 271 decided that,

> "After the dissolution of a co-partnership one of the partners in a suit brought against the firm has no authority to enter an appearance for the partners who do not reside in the State where the suit is brought and have not been served with process."

Justice Bradley who delivered the opinion of the Court uses this language therein:

> "In the case of Bell vs. Morrison, 1 Peters 351 this court decided upon elaborate examination that after a dissolution of the partnership one partner cannot by his admissions or promises bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt. It is well settled by numberless cases even before dissolution one partner cannot confess judgment or submit to arbitration so as to bind his co-partners. It is well settled that after dissolution one partner cannot bind his co-partners by any contract or securities or impose upon them a fresh liability.

> Appearance to a suit does impose a fresh liability * * * * on principle therefore it is difficult to see how after dissolution one partner can claim implied authority to appear for his co-partners in a suit brought against this firm."

We say that it is certainly quite as grave an act upon the part of one partner to file a voluntary petition in bankruptcy in the partnership name without express statutory authority so to do, as it is to enter an appearance or submit a question to arbitration or to confess a judgment. In fact the filing of a voluntary petition in bankruptcy carries with it a confession of judgment because a decree of adjudication immediately follows and settles for all time by a judgment of the court that the partnership is insolvent. To use the language of Justice Bradley it is therefore upon principle difficult to see how after a dissolution of the partnership one partner can plunge the partnership into a voluntary proceeding in the absence of express authority so to do.

We respectfully submit that under the above authorities the District Court and the Circuit Court of Appeals erred in the orders made in this case.

III

AN INVOLUNTARY PETITION IN BANKRUPTCY CANNOT BE INSTITUTED AGAINST INDIVIDUALS UPON THE PETITION OF ONE ASSERTING HIMSELF TO BE A PARTNER IN

TRADE WITH THE INDIVIDUALS PROCEEDED AGAINST.

The bankruptcy act of 1898 declares that there shall be two kinds of bankruptcy, voluntary and involuntary. See Section 4.

The voluntary petition is instituted by the bankrupt himself by filing in court his petition and attaching thereto the schedules of his property and it makes no difference whether he is solvent or insolvent, for even a solvent person has a right to surrender his property to the bankruptcy court and have it administered therein. Collier on bankruptcy 12 Edition, page 141.

We concede that the several persons who constitute a partnership may agree among themselves to liquidate said partnership, whether solvent or insolvent, in the bankruptcy court; but we deny that one partner, against the consent of his co-partners, can institute a voluntary petition in bankruptcy for the partnership; much less can he do so as against his co-partners as individuals, notwithstanding the peculiar provisions of the defunct Act of 1867; because said provisions of the Act of 1867 are not embodied in the present act of 1898, but are omitted therefrom and because the said act of John M. Shugert in attempting so to do is a wrongful act, forbidden by the Pennsylvania Statute on partnerships as well as by the general law, because the said at-

tempted act of a partner necessarily would destroy the business of the partnership.

An involuntary proceeding can only be instituted by creditors against a person, firm or corporation (not excepted in clause B. of Section 4) that may owe debts of $1,000.00 or over and has committed one of the acts of bankruptcy specified in Section 3. The act further prescribes that in the case of the involuntary petition there shall be three or more creditors who have claims in excess of securities held by them in the aggregate amounting to $500.00 or over, unless it shall appear that there are less than twelve creditors in which case one creditor whose claim amounts to $1,000.00 or over may file such petition. Section 59.

The petition in this case is a multifarious affair. Shugert in his original petition first of all seeks to have himself adjudged a bankrupt individually. Then follows a prayer for the adjudication of a partnership which Shugert alleges to exist. Now in the amended petition, he attempts to institute against Meek and his other surviving partners an involuntary proceeding and prays that they may be adjudicated bankrupts **individually.** We say there is no authority in the bankruptcy act for any such three-cornered proceeding, nor is there any provision in the bankruptcy act which authorizes one partner to file an involuntary petition against his other partners.

Opposing counsel contend that authority for this proceeding is found in the case of Francis vs. McNeal 228 U. S. 695, 57 L. E. 1029, and the Circuit Court of Appeals seem to hold that this case controls the case at bar. A careful analysis of Francis vs. McNeal will disclose that it is not authority for the present proceeding.

Two questions were decided in this case:

1. That where an involuntary petition is filed against a partnership it must be alleged and proved not only that the partnership is insolvent but also that all the individual members of the partnership are also insolvent. That is to say that the aggregate property of all the partners and of the partnership is not sufficient to pay the debts of the partnership and the individual debts of the partners.

2. The Court decided that where an involuntary petition was filed against the partnership and the partnership was adjudicated a bankrupt the Court has jurisdiction to compel the other partners to file schedules of their property as provided in General Order No. VIII and if it shall be found that the aggregate property of both partnerships and individuals is not sufficient to pay all the debts, that the bankruptcy court has jurisdiction to administer the individual property of the individual partners.

The material difference between these two cases is that in Francis vs. McNeal an **involuntary** petition

was filed by the creditors, while in the case at bar a voluntary petition was filed by one partner, and that is the very thing we contend cannot be done where the purpose of the petition is to bring about the adjudication in bankruptcy of individuals, which we say can only be done by an involuntary petition filed by creditors.

IV.

PROBATE COURTS HAVE EXCLUSIVE JURISDICTION TO ADMINISTER THE ASSETS OF DECEASED PERSONS.

Both the original petition and the amended petion filed in this case state that—

> "Lavinia Katherine Harris (who in her life time was a partner in this business) died on or about the 10th day of January, A. D. 1921, and her estate will be administered by the Orphan's Court of Centre County upon the filing of the account by her executors."

And in the prayer of the petition it is stated that George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze are "Surviving partners of Lavinia Katherine Harris, deceased."

The Supreme Court of the United States long ago recognized the principle that the Probate Courts of the several States have full and exclusive control over the estates of deceased persons. In the case of Yonley vs. Lavender 88 U. S. 276; 22 L. E. 536 the

Supreme Court uses this language:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas (the same is true in Pennsylvania) the probate of wills and the grant of letters testamentary and of administration are matters entirely within the jurisdiction of the Probate Court. The legal effect of granting letters testamentary or of administration is to place the whole estate real and personal within the custody of the law and leave it there until the administration has been completed. In this way the assets are preserved that there may be a fair and equal division of them among the several creditors according to a scale of priority fixed by law * * * * all demands against deceased persons which are not liens upon specific property before the death of the debtor can only be collected by being brought under the administration of the Probate Court."

The Court then further considers the question in connection with the jurisdiction of the Orphans' Court in the State of Mississippi and cited the case of Williams vs. Benedict, 8 Howard 107. "The jurisdiction of the Orphan's Court had attached to the assets; they were in *gremio legis* and could not be seized by process from another Court."

We contend that the same rule of law prevails in connection with the bankruptcy law and that where one of the partners dies, thereafter the estate of such partner cannot be adjudged a bankrupt and it necessarily follows that there can be no bankrupt-

cy adjudication against the partnership one member of which is dead.

Collier on bankruptcy 12th Edition, Page 175.

Collier says that there is a conflict of authority upon this question, but he also recognizes the principle above quoted concerning the jurisdiction of the Probate Court and in discussing this case says:

> "The only difficulty had upon adjudication in such a case is the consequent interference with the administration of the Probate Court of the estate of the deceased partner. In the above absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the Probate Court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than to denial of justice."

The Supreme Court of the United States has apparently not passed upon the question but there are a number of well considered cases which hold in accordance with the text in Collier just quoted.

In the case of Fackleman 41 A. B. R. 14; 248 Fed. 565 the matter is passed upon by Judge Bledsoe, Southern District of California, and he uses this language—

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labored under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

The precise question under consideration here was passed upon by Judge Newman in the Northern District of Georgia, in the case of Evans, 20 A. B. R. 406; 16 Fed. 590 in which case he held,

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

This was also the decision of the courts under the bankruptcy act of 1867 the leading case upon the subject being in re Temple, Fed. Case No. 1 13825 and reported in 23 Fed. cases at page 835.

In this case Temple was a member of two partnership firms viz.:—Temple & Workman and Temple & Ledyard. He averred that both firms were insolvent and attached his individual schedule and the schedules of both firms. Adjudication followed and Temple as an individual and both partnerships were adjudged bankrupts.

After the petition in bankruptcy was filed and the adjudication made a creditor filed a bill in equity in the district court of California in behalf of himself and other creditors, in which it is set forth that both firms were insolvent and that Temple and the firm of Temple & Workman with intent to defeat the operation of the bankrupt laws had made an assignment of all their individual and partnership assets.

Temple likewise made an assignment of the as-

sets of Temple & Ledyard in trust for the satisfaction of creditors. It is further stated that assignees had taken possession of the property under circumstances which charged them with notice of the fact of insolvency.

The prayer of the bill is that in view of the fact that no assignee in bankruptcy had been appointed that (the assignees) Freeman and Spence might be enjoined from making any disposition or transfer of the assets conveyed to them under the assignment and that they be decreed to hold the same in trust for the assignee in bankruptcy to be elected.

The defendants, Freeman and Spence, the assignees referred to, filed a general demurrer and the Court in passing upon the question said:—

> "It is clear that the action of the register (the bankruptcy officer who made the adjudication under the act of 1867) adjudicating the firm of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard as expressly required by rule 18 of the Supreme Court and Workman was dead at the time the court would commence proceedings. * * * * The act speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors notwithstanding a former dissolution inter sese where there are joint assets and joint creditors it has never been held that a partnership dissolved by the death of one of the partners can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws. * * * The status of a deceased person cannot be passed upon by a bank-

ruptcy court nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partners."

We therefore say to the Court that it appearing from the averments in both the original and amended petitions of John M. Shugert that the said petitioner, Meek, Breeze and Mrs. Dale are surviving partners of Mrs. Lavinia Harris and that the latter died in January, 1921, and her estate is now being administered in the Orphan's Court of Centre County, it necessarily follows that the District Court below is without jurisdiction and the said petitions should be dismissed."

V.

SCOPE OF, AND INTERPRETATION OF THE PROVISIONS OF GENERAL ORDER NO. VIII AS APPLIED TO THE CASE AT BAR.

The foundation for this whole proceeding is section 5 of the Bankruptcy Act of 1898 as supplemented by the provisions of General Order No. VIII.

Section 5 provides:—

(A) "A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.

(B) The court of bankruptcy which has juris-

diction over one of the partners may have jurisdiction over all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides:—

"Any member of a partnership who refuses to join in the petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defense which any debtor proceeded against is entitled to take by the provision of the act."

General Order No. VIII is practically a repetition of General Order No. XVIII of the act of 1867, which act expressly provided that a subpoena in bankruptcy might issue either on the petition of the partners or **any one of them.** This provision having been omitted from the Act of 1898 we believe that the provisions of General Order No. VIII are broader than the act itself and insofar as its provisions are inconsistent with the Act itself it must abate.

We contend that Section B quoted above relates to the venue and is territorial in its application.

That is to say that if an involuntary petition in bankruptcy be filed by creditors against the partnership that the court in which the same is filed shall have jurisdiction over all the partners even though some of them live beyond the jurisdiction of the court in which the petition is filed. It certainly is not authority for the proposition that one partner contrary to the fundamental law governing partnerships may institute a proceeding that will destroy the partnership. One partner cannot make an assignment of the partnership assets; dispose of the good will of the business; do any act which would make it impossible to carry on the ordinary business of the partnership, or confess a judgment against the partnership.

It appears upon the face of this petition that more than six months prior to the filing of the petition the partnership was dissolved by operation of law (the death of Lavina Katherine Harris) and that her estate is being administered in the Probate Court. Whether her estate is solvent or insolvent does not appear and there is no averment in the petition itself regarding this matter. Just when this estate will be finally administered nobody knows. The other partners are entitled to have her estate duly administered before any liability is fixed upon them for the debts of the Centre County Banking Company. That is to say their liability cannot be measured until the exact status of the estate of this dead woman shall be ascertained, and there is no

provision in the law authorizing a trustee in bankruptcy to intervene in this estate, and at least two District Courts have held that where this situation arises there cannot be any bankruptcy proceedings against a partnership.

In the discussion of the foregoing points we have not commented on the reasons appearing in the opinion of the Circuit Court of Appeals affirming the order of the District Court. We have all along realized that courts of lower and intermediary jurisdiction would feel that Order No. VIII authorized by this Court would be more or less mandatory upon them. Thus it will appear from the said opinion that it is largely based upon its construction of said order as regulating the procedure under the Bankrupt Act of 1898. It would, therefore, seem to us all the more necessary that this Court shall decide in an adjudicated case whether or not the said lower Court's construction of General Order No. VIII is authorized by our present bankruptcy legislation, and especially whether the construction placed upon it by the lower courts in this case comes within the spirit and express legislation of Congress. We do not believe that this Court in said General Order had the purpose or intention of legislating the omitted provisions of the Bankruptcy Act of 1867 into the present Bankruptcy Act; nor do we concede that the strained construction placed upon said General Order, by the lower courts, in this case, is the proper and consistent one to carry out the real purposes thereof.

The learned court below establishes a basis for its reasoning by an implication that because the Act provides that "a partnership may be adjudged a bankrupt"—that it may be so adjudged by a process not authorized by the Act itself. To our mind this is a reversal of all the rules of statutory construction. There is clearly no intention of enlarging in the language of Section 5 of the Act of 1898 the jurisdictional power of the Federal Courts or of creating a process other than that explicitly laid down in the Act itself, and the learned Judge is driven to re-enforce his reason by calling in General Order No. VIII. It is true that there are some decisions in the lower courts sustaining the position as recited in the said opinion, but a number of rulings by other lower federal courts could be cited to the contrary. None of the questions here involved were before this court in Francis vs. McNeal, 228 U. S. 695, for in the said cited case the petitioner was a creditor in an involuntary proceeding and the resisting partner and respondent was held by this Court to have estopped himself by his own prior acts and agreements as appeared from the record; thus waiving all his status as a non-assenting partner.

Nor can it be fairly argued from the wording of Section 5c that the provisions of the prior Act of 1867 omitted from the Act of 1898 shall be read into it, for that is merely a proper provision to enable one district court, which has already jurisdiction, under the statute, over the partnership and one or more of the partners, to take jurisdiction over all

the remaining partners whether they happen to reside within that particular district or not.

Still more unsatisfactory is the reasoning in the opinion on the effect of the death of Lavina Katherine Harris. In fact, this phase of the question is really not discussed or fairly met in the said opinion. There is no attempt to meet the objections of the authorities holding to the contrary and no light or suggestion given to regulate the practice.

We, therefore, urge upon this Court the necessity of a careful revision, because the questions raised herein are of the widest public interest; because none of them have been finally determined in the highest court of the land; because no other tribunal than this one can frankly discuss whether or not General Order No. VIII is judicial or legislative in its essence; because there is pressing need for a uniform system and interpretation of the questions here raised in all of the several courts of this country; and because we believe the order and decree of the courts below is in violation of the fundamental rights of the petitioner as a citizen.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.

Attorneys for Petitioner.

September 22nd, 1923.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 2945 March Term, 1923

GEORGE R. MEEK,

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts.

No. 2946 March Term, 1923

FLORENCE F. DALE,

vs.

SAME

No. 2971 March Term, 1923

ANDREW BREEZE,

vs.

SAME

Petitions for Review from the District Court of the United States for the Middle District of Penn-

Before BUFFINGTON and DAVIS, Circuit Judges, and McKEEHAN, District Judge.

DAVIS, C. J.:

All three of these cases were argued together.

The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her Estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoenas on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5a and c, of the Act of 1898 provides that:

(a) "A partnership, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(c) The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

"Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not to voluntary petitions in bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5

of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires us to hold that it did? If the Act of 1898 had provided that "a partnership may be adjudged a bankrupt" on the petition of "any creditor," this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "any one" of the partners, and by "any creditor." The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that:

"Any member of a partnership who refuses to join in the petition—shall be entitled to resist the prayer" etc. By the words "join in," the Supreme Court had in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in." Judge Lowell held in the case of In re Forbes et al, 128 Fed. 137, 140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis vs. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other

to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong vs. Fisher et al, 224 Fed. 97; Francis vs. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth vs. Slipper et al, 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question!" Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al vs. Security Bank of Memphis et al, 130 Fed. 436, 442. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is

AFFIRMED.

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CASES CITED BY PETITIONER

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In re Fackleman, 248 Fed. 565

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State *vs.* Tucson Gas Co., 15 Arizona 294

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25 Corpus Juris, Note 17 (c), page 220

Section 36, of the Bankruptcy Act of 1867

The Bankruptcy Act of 1898

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In re Forbes et al., 128 Fed. 137-140

Francis *vs.* McNeal, 228 U. S. 695

Armstrong *vs.* Fisher et al., 224 Fed. 227

Yungbluth *vs.* Slipper et al., 185 Fed. 773

Vaccaro et al. *vs.* Secy. Bank of Memphis, 130 Fed. 436

In re Stem & Company, 127 Fed. 547

Section 5, of the Bankruptcy Act of 1898

General Order No. VIII, promulgated by the Supreme Court

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1923

FLORENCE F. DALE *Petitioner,* *vs* CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts. *Respondents.*	Notice of Motion, Docket No.

To N. B. SPANGLER,
S. D. GETTIG,
Bellefonte, Pa.

Attorneys for Centre County Banking Company and John M. Shugert, Respondents:

Gentlemen:

Please take notice that upon a certified copy of the transcript of record in the above stated case, including the proceedings had in the Circuit Court of Appeals for the 3rd Circuit, and upon the annexed petition of Florence F. Dale, sworn to on the 11th day of September, 1923, we shall make the motion hereto annexed before the Supreme Court of

the United States at the Capitol in the City of Washington on the 8th day of October, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Yours, Etc.,

MORTIMER C. RHONE,
Williamsport, Pa.

R. L. BIGELOW,
Hazleton Pa.,

ELLIS L. ORVIS,
Bellefonte, Pa.

Attorneys for Petitioner.

AND NOW September 11th, 1923, we hereby accept service of the above notice and annexed petition.

N. B. SPANGLER,
Atty for Creditors' Committee.

S. D. GETTIG,
Atty for John M. Shugert, et al.

FLORENCE F. DALE
Petitioner,
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts,
Respondents.

Motion for Certiorari.

And now comes the petitioner, Florence F. Dale, by her counsel, Mortimer C. Rhone (with him R. L. Bigelow and Ellis L. Orvis) duly admitted to practice in the Supreme Court of the United States, and moves your Honorable Court upon a certified copy of the transcript of the record in the above stated case, including the proceedings had in the Circuit Court of Appeals of the United States for the 3rd Circuit and upon the annexed petition sworn to on the 11th day of September, 1923, for a writ of certiorari directed to the Circuit Court of Appeals of the United States for the 3rd Circuit, and to the District Court of the United States for the Middle District of Pennsylvania, to bring before your Honorable Court the case of Florence F. Dale, petitioner, vs. Centre County Banking Company, a partnership and John M. Shugert, individually, bankrupts No. 2946, March Term, 1923, in the Circuit Court of Appeals of the United States for the 3rd Circuit recently decided by said Circuit Court of Appeals, and by the District Court of the United States for the Middle District of Pennsylvania, for such proceed-

ings therein as to this Court may seem just, and for such other further relief in the premises as may be just.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

R. L. BIGELOW,
Hazleton Pa.,

ELLIS L. ORVIS,
Bellefonte, Pa.

Counsel for Petitioner.

FLORENCE F. DALE
Petitioner

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.
Respondents.

Petition for Writ of Certiorari.

TO THE HONORABLE,

THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Florence F. Dale respectfully represents as follows:

FIRST: That heretofore, to wit on August

26th, 1922, the said John M. Shugert filed in the District Court of the United States for the Middle District of Pennsylvania, Docket No. 4268, an amended involuntary petition in bankruptcy (see record page 56) wherein he averred inter alia that he as an individual was insolvent; that the Centre County Banking Company, a partnership composed of himself, George R. Meek, Florence F. Dale, Andrew Breeze, Mary Harris, then living and Lavina Katherine Harris, then deceased, was likewise insolvent, and that each of said partners were insolvent and jointly and severally unable to pay the partnership debts; that the estate of Lavina Katherine Harris, a former partner, who died January 10, 1921, was in the custody of the Orphans' Court of Centre County, and of which estate John Blanchard and Sarah C. Brown were her executors.

The prayer of the petition is

> "That such partnership as well as Geo. R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt within the purview of such bankruptcy law of 1898 as amended, and that service of this petition be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings may be had as are provided in said law and General Order VIII, of the Supreme Court as the Court may order."

SECOND: That your petitioner moved to dismiss the said petition in bankruptcy upon grounds stated therein (record 65).

A. That the District Court was without jurisdiction to allow or determine an involuntary petition

in bankruptcy against this petitioner filed by the said John M. Shugert.

B. That an involuntary petition in bankruptcy could only be filed and prosecuted by the required number of creditors and that only upon a proper averment that the petitioner had committed one or more of the several acts of bankruptcy defined in the Bankruptcy Act.

C. That the original petition filed by Shugert was a voluntary one on his part and the amended petition being a combination voluntary and involuntary petition the amendment was improperly allowed.

D. That where it appears upon the record that prior to the filing of a petition in bankruptcy by a surviving partner that the partnership was dissolved by operation of law by the death of one of the partners, and whose Estate was then in process of administration in the Probate Court, a surviving partner could not institute bankruptcy proceedings against the partnership.

E. That in the Bankruptcy Act of 1898 one partner cannot without the consent of his other partners institute bankruptcy proceedings to have the partnership declared bankrupt.

F. That insofar as General Order No. VIII of the Supreme Court of the United States attempts to confer jurisdiction upon Courts of Bankruptcy to adjudicate as bankrupts non-consenting partners, who refuse to join in a bankruptcy petition instituted by one partner, said General Order is in effect legislation at variance with the statute itself, and the enforcement of such order against your petitioner would be denying him the equal protection of the laws and amount to the taking of his property without due process of law.

THIRD: After argument had upon the motion to dismiss the Honorable Charles B. Witmer District Judge allowed the amended petition to be filed and directed a subpoena to issue as prayed for therein, and a subpoena was issued and served upon your petitioner (record 60) requiring him "to answer a petition filed by John M. Shugert in our said Court praying that you may be adjudged a bankrupt and to do further and receive that which our said District Court shall consider in your behalf."

FOURTH: The petitioner after this subpoena was issued appeared specially and for the purpose only of quashing the subpoena and to dismiss the amended petition upon the grounds above stated, which motions were denied by the District Court, and a petition to revise in matter of law was filed in the Circuit Court of Appeals, and that Court in an opinion by Judge Davis affirmed the order of the District Court. See opinion, page 42.

FIFTH: As the record now stands the District Court of the United States for the Middle District of Pennsylvania and the Circuit Court of Appeals for the 3rd Circuit have decided the following propositions of law which will be hereafter binding in the 3rd circuit at least, unless application for this writ of certiorari shall be granted and the orders so made reversed by the Supreme Court:

A. That one partner may without the consent and against the protest of the other partners institute and prosecute a bankruptcy proceeding against the partnership.

B. That one partner may maintain an involuntary petition in bankruptcy against his other partners without setting forth therein any of the Acts of

Bankruptcy defined in the statute, and notwithstanding the terms of the statute, which provide that only creditors may maintain involuntary bankruptcy proceedings.

C. That a surviving partner may institute bankruptcy proceedings to have the partnership declared bankrupt even where it appears upon the face of the petition so filed that several months prior thereto the partnership was dissolved by operation of law, viz., the death of one of the partners, and such partner's Estate is then being administered in the State Probate Court.

D. That the authority of the above propositions of law upon which the decision of the Circuit Court of Appeals and the District Court was founded, is General Order No. VIII promulgated by the Supreme Court after the passage of the Act of 1898, and which order is in almost identical language with that of General Order No. 18 made after the passage of the Act of 1867, which Act expressly provided that one partner might file a petition to have the partnership adjudged a bankrupt.

SIXTH: Your petitioner contends that the District Court and the Circuit Court of Appeals erred in refusing to quash the subpoena and dismiss the petition in bankruptcy vs. your petitioner and the partnership and that the decision of both Courts is at variance with the provisions of the bankruptcy statute, and of the following decisions of the Federal Courts upon the questions which Federal Courts have passed upon that are raised in this record, viz.,

Arthur vs. Cumming 91 U. S. 362.
Hobbs vs. McLean 117 U. S. 567.
25 Corpus Juris, note 17 (c) page 220.

Deckert vs. Filbert 3 W & S 454.
Hall vs. Lanning 91 U. S. 160; 23 L. E. 271.
Yonley vs. Lavender 88 U. S. 276; 22L E. 536.
In re Fackleman 41 A. B. R. 14; 248 Fed. 565.
In re Evans 20 A. B. R. 406; 16 Fed. 590.
In re Temple Fed. Cases No. 1-13825 and recorded in Vol. 23, Fed. cases at page 835.

Whereas the Circuit Court of Appeals and the District Court held that the case at bar is ruled by the following authorities.

Section 5 of the Bankruptcy Act of 1898.

General Order No. VIII promulgated by the Supreme Court.

In re Forbes et al, 128 Fed. 137-140.
Francis vs. McNeal 228 U. S. 695.
Armstrong vs. Fisher et al 224 Fed. 227.
Yungbluth vs. Slipper et al 185 Fed. 773.
Vaccaro et al vs. Secretary Bank of Memphis 130 Fed. 436-442.
In re Stem & Company 127 Fed. 547.

SEVENTH: That the questions that your petitioner desires among other things to have decided in this Court are as stated in the brief filed in the Circuit Court of Appeals as follows:

1. "Jurisdiction of the Bankruptcy Court to issue a subpoena upon the voluntary petition of one partner requiring remaining partners to show cause why they should not be adjudicated bankrupts individually.

2. Jurisdiction of the Bankruptcy Court to adjudicate a partnership bankrupt upon the sole

petition of one partner without the consent or assent of remaining partners.

3. Jurisdiction of the Bankruptcy Court to hear and determine a petition in bankruptcy filed by one partner to have the partnership adjudicated a bankrupt without consent or assent of remaining partners, where it appears upon the face of the petition that one of the alleged partners' Estate is then being administered in the Orphans' Court.

4. Scope of, and interpretation of the provisions of General Order No. VIII as applied to the case at bar."

EIGHTH: Herewith filed is the certified transcript of the record of the proceedings in the Circuit Court of Appeals for the 3rd Circuit and in the District Court of the United States for the Middle District of Pennsylvania, together with certified copies of the opinions of said Courts and of the order made by said Circuit Court of Appeals affirming the judgment of the District Court.

WHEREFORE your petitioner prays your Honorable Court to issue a writ of certiorari to the Circuit Court of Appeals of the United States for the 3rd Circuit, and the District Court of the United States for the Middle District of Pennsylvania, to send up the record in said case to the end that the manifold errors herein complained of may be corrected, and the order made by each of said courts be reversed and the petition to revise in matter of law

granted, and for such other and further relief as to your Honorable Court may seem just.

FLORENCE F. DALE
by Ellis L. Orvis her Attorney.

MORTIMER C. RHONE,
Williamsport, Pa.

R. L. BIGELOW,
Hazleton Pa.,

ELLIS L. ORVIS,
Bellefonte, Pa.

Attorneys for Petitioner.

Dated at Bellefonte, Pa., September 11th, 1923.

State of Pennsylvania
County of Centre ss

Ellis L. Orvis attorney for Florence F. Dale being duly sworn deposes and says that he has read the foregoing petition and knows the facts therein set forth and the same are true to the best of his knowledge, information and belief, and that he believes them to be true.

ELLIS L. ORVIS

Sworn and subscribed to before me this 11th day of September, 1923.

BELLE WEAVER,
Notary Public.
My Commission expires February 2nd, 1925.
(SEAL)

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1923.

FLORENCE F. DALE

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.

Petitioner's Brief

STATEMENT OF THE CASE.

John M. Shugert filed a petition in bankruptcy in the Middle District of Pennsylvania in which he sets forth that he individually is insolvent and that he "George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze who survive Lavina Katherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, with its principal place of business at Bellefonte, Pa.," and that the partnership is likewise insolvent. He further avers that "Lavina Katherine Harris who in her lifetime was a partner died on the 10th day of January, 1921, and that her estate is now being administered" in the Orphans' Court of Centre County, Pa. This original petition filed the 30th day of June, 1922, prayed

for a subpoena which was awarded and served upon the surviving other partners. That the petitioner and his co-respondents moved to quash and set aside the said subpoena upon the grounds, inter alia, that it was not responsive to the prayer of the petitioner in that it required the remaining living partners to show cause why each of them should not be individually adjudicated a bankrupt.

This motion to quash and dismiss was sustained in the District Court. But on the same day the petitioner (Shugert) was allowed to amend his original petition so as to read as follows:

> "Such partnership as well as the said George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt * * * * that service of the petition, together with a subpoena be made upon the said George R. Meek, and other respondents, and that proceedings be had as provided in the Bankruptcy Act and General Order No. VIII."

About the same time, or shortly thereafter, the District Court appointed Ivan Walker Esq., Temporary Receiver of the partnership, so that said partnership assets are now being collected and conserved.

Following the filing of this amended petition a subpoena was issued (record 60) addressed "to George R. Meek, Mary C. Harris, Florence F. Dale

and Andrew Breeze, surviving partners of Lavina Katherine Harris, deceased, individually and trading as Centre County Banking Company," by the terms of which each of said individuals is required to appear to answer the petition filed by Shugert and **show cause why they as individuals** should not be adjudged bankrupts, and why said partnership should not be adjudged bankrupt.

George R. Meek, Florence F. Dale and Andrew Breeze filed their several motions to dismiss this amended petition and quash the subpoena for reasons set forth in the motion (record 65), this motion having been filed October 3, 1922.

The District Court without an opinion, denied the motion to dismiss, whereupon these three petitioners presented a petition to the Circuit Court of Appeals for the 3rd Circuit to revise the order of the District Court, and after argument thereon the Circuit Court of Appeals affirmed the order of the Court below, and these petitioners now ask this Court to issue a writ of certiorari to the Circuit Court of Appeals and the District Court to correct the errors complained of in the motion and brief filed.

Several questions of law are raised by the record that are novel, of wide public interest, and never heretofore analytically discussed and determined by this Court. So far as we can ascertain some of them have never been raised. There is a conflict of authority in the lower courts upon all these questions. As to the one involved by the death of Lavina

Katherine Harris upon the jurisdiction of the bankruptcy courts, an apparent conflict of authorities is admitted in the opinion of his Honor Judge Davis of the Circuit Court of Appeals.

So far as our search goes among the reported cases no partner has anywhere asked that his non-assenting co-partners shall be declared **individually** bankrupt, at least there is no authoritative decision that he may lawfully do so especially when he fails to aver that he is a creditor of the said remaining partners.

The questions involved are not only unique and novel because of their intrinsic importance and the lack of direct authoritative rulings thereon, but are rendered much more so by the attempt to combine in one procedure a voluntary bankruptcy with the involuntary bankruptcy both of the partnership itself and of the resisting surviving partners, and that too, without the intervention of a single creditor either of the petitioner, the partnership, or of the remaining members of the partnership.

But this does not state the whole of the complex problem thus created because the record further shows the additional complication caused by the prior death of Lavina Katherine Harris, thereby creating a conflict of jurisdiction between the Pennsylvania Probate Court, which has exclusive jurisdiction over the estates of decedents, and the Federal Court sitting in bankruptcy.

POINTS

I

THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS BY THE DECISION IN THIS CASE HOLD THAT ONE PARTNER MAY WITHOUT THE CONSENT AND AGAINST THE PROTEST OF HIS OTHER PARTNERS INSTITUTE AND PROSECUTE A BANKRUPTCY PROCEEDING AGAINST THE PARTNERSHIP.

These petitioners contend that there is no authority in the Bankruptcy Act of 1898 or the amendments thereto which will warrant any such proceeding because there is no statutory authority for it. Bankruptcy proceedings are in derogation of the common law and the provisions of such acts of the Legislature are to be strictly construed.

The Bankruptcy Act of 1867 specifically authorized the filing of a voluntary petition by any one of the partners. The language in that Act being, Section 36.

> 'Where two or more persons who are partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them or on the petition of any creditor of the partners, a warrant shall issue, etc.'

Since Congress in the Act of 1867 expressly provided that a voluntary bankruptcy proceeding by the partnership might be instituted by any one of

the partners and did not in the Act of 1898 incorporate any such provisions, under well known rules for the interpretation of statutes, the presumption is that Congress intentionally omitted this provision, and having omitted it no such power is conferred by the Act of 1898.

There is no reason to assume that Congress omitted the 36th Section of the Act of 1867 from the present Bankrupt Act of 1898 by mistake or oversight. There is obviously a change in the legislative policy; caused by the numerous decisions in the federal courts criticising the unfortunate results arising from the presence of Section 36 in the older Act. It was recognized that the practice under said Section opened an easy door to rapacious and designing persons to oppress and harass their partners; besides in too many instances it made the bankruptcy practice intricate and cumbersome by reason of the collateral issues of law and fact thus introduceable.

The maxim borrowed from the Roman law *expressio unius est exclusio alterius* is so universally accepted as "A well settled legal maxim" and "The well establishd principle or maxim of law," and "As that universal and familiar rule" and "A rule both of law and equity," and "The well known maxim of construction and a very sound one;" that it would be an affectation to quote any of the multiplicity of authorities whether Federal, State, or of the English Courts.

We will limit ourselves to apply this maxim in

discussing the inclusion of Clause 36 in the earlier statute and its exclusion or any provision analagous thereto from the present bankrupt act.

"No maxim of the law is of more general and uniform application and it is never more applicable than in the construction and interpretation of statutes;" and "The maxim was never more applicable than when applied to the interpretation of a statute that *expressio unius est exclusio alterius.*"

Broom's Legal Maxims, 8th Edition, page 663.

We must bear in mind that the Act of 1898 was not a repeal, amendment or a supplement to the Act of 1867, for that Act had expired by its own limitations; however much of its provisions were reincorporated in the present legislation, and the rejection of Section 36 emphasizes the reason for applying the maxim above quoted and indeed necessitates its application.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

25 Corpus Juris note "17 (c)" page 220.

State vs. Tucson Gas Company, 15 Arizona, 294.

New Haven vs. Whitney, 36 Conn., 374.

Township vs. Dubuque, 7 Iowa, 262.

Scott vs. Ford, 52 Or., 288.

While the Act of 1898 as just above stated has

not repealed the earlier Act of Congress, it is in fact a recodification, and its failure to include either Section 36 of the Act of 1867 or any similar provision implies in the strongest manner a negative.

"Possibly the strongest implication of a negative is found where subsequent statutes revise the whole matter of former ones."

Endlich on the Interpretation of Statutes, page 270.

So Mr. Justice Swain in delivering the opinion of the Supreme Court of the United States upon the construction of a revenue statute ruled that "The maxim *expressio unius est exclusio alterius* applies with cogent effect. This view is conclusive unless it is overcome by something else found in the statute."

Arthur vs. Cumming, 91 U. S. 362.

As Congress in 1898 refused to enact that "Partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them, a warrant shall issue," and the statute under which we are now living entirely omits any proceeding in bankruptcy by one partner against another, how can it be argued that our present legislation on bankruptcy provides for a procedure such as we have at bar, though formerly authorized by a statute now defunct, but expressly excluded from the Act of 1898? All the powers of the bankrupt court, all procedures to be followed therein are of statu-

tory origin and all its jurisdiction rests exclusively upon the statute of 1898 alone.

Hobbs vs. McLean, 117 U. S. 567.

The Supreme Court in the case of Hobbs vs. McLean 117 U. S. 567; 29 L. E. 940, said upon this question:

'Where a provision is left out of a statute either by design or by mistake of the legislator, the Courts have no power to supply it. To do so would be to legislate and not to construe.' "

II

POWER AND AUTHORITY OF PARTNERS.

The fundamental law relating to partnership in force throughout the United States and the rule in the Federal Courts is that:

> Unless authorized by the other partners or unless they have abandoned the business one or more but less than all the partners have no authority to—
>
> (A) Assign the partnership property in trust for creditors on the assignee's promise to pay the debts of the partnership.
>
> (B) Dispose of the good will of the business.
>
> (C) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(D) Confess a judgment.

(E) Submit a partnership claim or liability to arbitration or reference.

The Supreme Court of Pennsylvania many years ago decided in Dickert vs. Filbert 3 W. & S. 454 that one partner after the dissolution of partnership has no power to make a voluntary assignment of the effects of the partnership for the benefit of creditors without the consent of his co-partners.

The Supreme Court of the United States in Hall vs. Lanning 91 U. S. 160; 23 L. E. 271 decided that,

> "After the dissolution of a co-partnership one of the partners in a suit brought against the firm has no authority to enter an appearance for the partners who do not reside in the State where the suit is brought and have not been served with process."

Justice Bradley who delivered the opinion of the Court uses this language therein:

> "In the case of Bell vs. Morrison, 1 Peters 351 this court decided upon elaborate examination that after a dissolution of the partnership one partner cannot by his admissions or promises bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt. It is well settled by numberless cases even before dissolution one partner cannot confess judgment or submit to arbitration so as to bind his co-partners. It is well settled that after dissolution one partner cannot bind his co-partners by any contract or securities or impose upon them a fresh liability.

> Appearance to a suit does impose a fresh liability * * * * on principle therefore it is difficult to see how after dissolution one partner can claim implied authority to appear for his co-partners in a suit brought against this firm."

We say that it is certainly quite as grave an act upon the part of one partner to file a voluntary petition in bankruptcy in the partnership name without express statutory authority so to do, as it is to enter an appearance or submit a question to arbitration or to confess a judgment. In fact the filing of a voluntary petition in bankruptcy carries with it a confession of judgment because a decree of adjudication immediately follows and settles for all time by a judgment of the court that the partnership is insolvent. To use the language of Justice Bradley it is therefore upon principle difficult to see how after a dissolution of the partnership one partner can plunge the partnership into a voluntary proceeding in the absence of express authority so to do.

We respectfully submit that under the above authorities the District Court and the Circuit Court of Appeals erred in the orders made in this case.

III

AN INVOLUNTARY PETITION IN BANKRUPTCY CANNOT BE INSTITUTED AGAINST INDIVIDUALS UPON THE PETITION OF ONE ASSERTING HIMSELF TO BE A PARTNER IN

TRADE WITH THE INDIVIDUALS PROCEEDED AGAINST.

The bankruptcy act of 1898 declares that there shall be two kinds of bankruptcy, voluntary and involuntary. See Section 4.

The voluntary petition is instituted by the bankrupt himself by filing in court his petition and attaching thereto the schedules of his property and it makes no difference whether he is solvent or insolvent, for even a solvent person has a right to surrender his property to the bankruptcy court and have it administered therein. Collier on bankruptcy 12 Edition, page 141.

We concede that the several persons who constitute a partnership may agree among themselves to liquidate said partnership, whether solvent or insolvent, in the bankruptcy court; but we deny that one partner, against the consent of his co-partners, can institute a voluntary petition in bankruptcy for the partnership; much less can he do so as against his co-partners as individuals, notwithstanding the peculiar provisions of the defunct Act of 1867; because said provisions of the Act of 1867 are not embodied in the present act of 1898, but are omitted therefrom and because the said act of John M. Shugert in attempting so to do is a wrongful act, forbidden by the Pennsylvania Statute on partnerships as well as by the general law, because the said at-

tempted act of a partner necessarily would destroy the business of the partnership.

An involuntary proceeding can only be instituted by creditors against a person, firm or corporation (not excepted in clause B. of Section 4) that may owe debts of $1,000.00 or over and has committed one of the acts of bankruptcy specified in Section 3. The act further prescribes that in the case of the involuntary petition there shall be three or more creditors who have claims in excess of securities held by them in the aggregate amounting to $500.00 or over, unless it shall appear that there are less than twelve creditors in which case one creditor whose claim amounts to $1,000.00 or over may file such petition. Section 59.

The petition in this case is a multifarious affair. Shugert in his original petition first of all seeks to have himself adjudged a bankrupt individually. Then follows a prayer for the adjudication of a partnership which Shugert alleges to exist. Now in the amended petition, he attempts to institute against Meek and his other surviving partners an involuntary proceeding and prays that they may be adjudicated bankrupts **individually.** We say there is no authority in the bankruptcy act for any such three-cornered proceeding, nor is there any provision in the bankruptcy act which authorizes one partner to file an involuntary petition against his other partners.

Opposing counsel contend that authority for this proceeding is found in the case of Francis vs. McNeal 228 U. S. 695, 57 L. E. 1029, and the Circuit Court of Appeals seem to hold that this case controls the case at bar. A careful analysis of Francis vs. McNeal will disclose that it is not authority for the present proceeding.

Two questions were decided in this case:

1. That where an involuntary petition is filed against a partnership it must be alleged and proved not only that the partnership is insolvent but also that all the individual members of the partnership are also insolvent. That is to say that the aggregate property of all the partners and of the partnership is not sufficient to pay the debts of the partnership and the individual debts of the partners.

2. The Court decided that where an involuntary petition was filed against the partnership and the partnership was adjudicated a bankrupt the Court has jurisdiction to compel the other partners to file schedules of their property as provided in General Order No. VIII and if it shall be found that the aggregate property of both partnerships and individuals is not sufficient to pay all the debts, that the bankruptcy court has jurisdiction to administer the individual property of the individual partners.

The material difference between these two cases is that in Francis vs. McNeal an **involuntary** petition

was filed by the creditors, while in the case at bar a **voluntary** petition was filed by one partner, and that is the very thing we contend cannot be done where the purpose of the petition is to bring about the adjudication in bankruptcy of individuals, which we say can only be done by an involuntary petition filed by creditors.

IV.

PROBATE COURTS HAVE EXCLUSIVE JURISDICTION TO ADMINISTER THE ASSETS OF DECEASED PERSONS.

Both the original petition and the amended petion filed in this case state that—

> "Lavinia Katherine Harris (who in her life time was a partner in this business) died on or about the 10th day of January, A. D. 1921, and her estate will be administered by the Orphan's Court of Centre County upon the filing of the account by her executors."

And in the prayer of the petition it is stated that George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze are "Surviving partners of Lavinia Katherine Harris, deceased."

The Supreme Court of the United States long ago recognized the principle that the Probate Courts of the several States have full and exclusive control over the estates of deceased persons. In the case of Yonley vs. Lavender 88 U. S. 276; 22 L. E. 536 the

Supreme Court uses this language:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas (the same is true in Pennsylvania) the probate of wills and the grant of letters testamentary and of administration are matters entirely within the jurisdiction of the Probate Court. The legal effect of granting letters testamentary or of administration is to place the whole estate real and personal within the custody of the law and leave it there until the administration has been completed. In this way the assets are preserved that there may be a fair and equal division of them among the several creditors according to a scale of priority fixed by law * * * * all demands against deceased persons which are not liens upon specific property before the death of the debtor can only be collected by being brought under the administration of the Probate Court."

The Court then further considers the question in connection with the jurisdiction of the Orphans' Court in the State of Mississippi and cited the case of Williams vs. Benedict, 8 Howard 107. "The jurisdiction of the Orphan's Court had attached to the assets; they were in *gremio legis* and could not be seized by process from another Court."

We contend that the same rule of law prevails in connection with the bankruptcy law and that where one of the partners dies, thereafter the estate of such partner cannot be adjudged a bankrupt and it necessarily follows that there can be no bankrupt-

cy adjudication against the partnership one member of which is dead.

Collier on bankruptcy 12th Edition, Page 175.

Collier says that there is a conflict of authority upon this question, but he also recognizes the principle above quoted concerning the jurisdiction of the Probate Court and in discussing this case says:

> "The only difficulty had upon adjudication in such a case is the consequent interference with the administration of the Probate Court of the estate of the deceased partner. In the above absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the Probate Court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than to denial of justice."

The Supreme Court of the United States has apparently not passed upon the question but there are a number of well considered cases which hold in accordance with the text in Collier just quoted.

In the case of Fackleman 41 A. B. R. 14; 248 Fed. 565 the matter is passed upon by Judge Bledsoe, Southern District of California, and he uses this language—

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labored under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

The precise question under consideration here was passed upon by Judge Newman in the Northern District of Georgia, in the case of Evans, 20 A. B. R. 406; 16 Fed. 590 in which case he held,

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

This was also the decision of the courts under the bankruptcy act of 1867 the leading case upon the subject being in re Temple, Fed. Case No. 1 13825 and reported in 23 Fed. cases at page 835.

In this case Temple was a member of two partnership firms viz.:—Temple & Workman and Temple & Ledyard. He averred that both firms were insolvent and attached his individual schedule and the schedules of both firms. Adjudication followed and Temple as an individual and both partnerships were adjudged bankrupts.

After the petition in bankruptcy was filed and the adjudication made a creditor filed a bill in equity in the district court of California in behalf of himself and other creditors, in which it is set forth that both firms were insolvent and that Temple and the firm of Temple & Workman with intent to defeat the operation of the bankrupt laws had made an assignment of all their individual and partnership assets.

Temple likewise made an assignment of the as-

sets of Temple & Ledyard in trust for the satisfaction of creditors. It is further stated that assignees had taken possession of the property under circumstances which charged them with notice of the fact of insolvency.

The prayer of the bill is that in view of the fact that no assignee in bankruptcy had been appointed that (the assignees) Freeman and Spence might be enjoined from making any disposition or transfer of the assets conveyed to them under the assignment and that they be decreed to hold the same in trust for the assignee in bankruptcy to be elected.

The defendants, Freeman and Spence, the assignees referred to, filed a general demurrer and the Court in passing upon the question said:—

> "It is clear that the action of the register (the bankruptcy officer who made the adjudication under the act of 1867) adjudicating the firm of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard as expressly required by rule 18 of the Supreme Court and Workman was dead at the time the court would commence proceedings. * * * * The act speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors notwithstanding a former dissolution inter sese where there are joint assets and joint creditors it has never been held that a partnership dissolved by the death of one of the partners can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws. * * * The status of a deceased person cannot be passed upon by a bank-

ruptcy court nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partners."

We therefore say to the Court that it appearing from the averments in both the original and amended petitions of John M. Shugert that the said petitioner, Meek, Breeze and Mrs. Dale are surviving partners of Mrs. Lavinia Harris and that the latter died in January, 1921, and her estate is now being administered in the Orphan's Court of Centre County, it necessarily follows that the District Court below is without jurisdiction and the said petitions should be dismissed."

V.

SCOPE OF, AND INTERPRETATION OF THE PROVISIONS OF GENERAL ORDER NO. VIII AS APPLIED TO THE CASE AT BAR.

The foundation for this whole proceeding is section 5 of the Bankruptcy Act of 1898 as supplemented by the provisions of General Order No. VIII.

Section 5 provides:—

(A) "A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.

(B) The court of bankruptcy which has juris-

diction over one of the partners may have jurisdiction over all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides:—

"Any member of a partnership who refuses to join in the petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defense which any debtor proceeded against is entitled to take by the provision of the act."

General Order No. VIII is practically a repetition of General Order No. XVIII of the act of 1867, which act expressly provided that a subpoena in bankruptcy might issue either on the petition of the partners or **any one of them.** This provision having been omitted from the Act of 1898 we believe that the provisions of General Order No. VIII are broader than the act itself and insofar as its provisions are inconsistent with the Act itself it must abate.

We contend that Section B quoted above relates to the venue and is territorial in its application.

That is to say that if an involuntary petition in bankruptcy be filed by creditors against the partnership that the court in which the same is filed shall have jurisdiction over all the partners even though some of them live beyond the jurisdiction of the court in which the petition is filed. It certainly is not authority for the proposition that one partner contrary to the fundamental law governing partnerships may institute a proceeding that will destroy the partnership. One partner cannot make an assignment of the partnership assets; dispose of the good will of the business; do any act which would make it impossible to carry on the ordinary business of the partnership, or confess a judgment against the partnership.

It appears upon the face of this petition that more than six months prior to the filing of the petition the partnership was dissolved by operation of law (the death of Lavina Katherine Harris) and that her estate is being administered in the Probate Court. Whether her estate is solvent or insolvent does not appear and there is no averment in the petition itself regarding this matter. Just when this estate will be finally administered nobody knows. The other partners are entitled to have her estate duly administered before any liability is fixed upon them for the debts of the Centre County Banking Company. That is to say their liability cannot be measured until the exact status of the estate of this dead woman shall be ascertained, and there is no

provision in the law authorizing a trustee in bankruptcy to intervene in this estate, and at least two District Courts have held that where this situation arises there cannot be any bankruptcy proceedings against a partnership.

In the discussion of the foregoing points we have not commented on the reasons appearing in the opinion of the Circuit Court of Appeals affirming the order of the District Court. We have all along realized that courts of lower and intermediary jurisdiction would feel that Order No. VIII authorized by this Court would be more or less mandatory upon them. Thus it will appear from the said opinion that it is largely based upon its construction of said order as regulating the procedure under the Bankrupt Act of 1898. It would, therefore, seem to us all the more necessary that this Court shall decide in an adjudicated case whether or not the said lower Court's construction of General Order No. VIII is authorized by our present bankruptcy legislation, and especially whether the construction placed upon it by the lower courts in this case comes within the spirit and express legislation of Congress. We do not believe that this Court in said General Order had the purpose or intention of legislating the omitted provisions of the Bankruptcy Act of 1867 into the present Bankruptcy Act; nor do we concede that the strained construction placed upon said General Order, by the lower courts, in this case, is the proper and consistent one to carry out the real purposes thereof.

The learned court below establishes a basis for its reasoning by an implication that because the Act provides that "a partnership may be adjudged a bankrupt"—that it may be so adjudged by a process not authorized by the Act itself. To our mind this is a reversal of all the rules of statutory construction. There is clearly no intention of enlarging in the language of Section 5 of the Act of 1898 the jurisdictional power of the Federal Courts or of creating a process other than that explicitly laid down in the Act itself, and the learned Judge is driven to re-enforce his reason by calling in General Order No. VIII. It is true that there are some decisions in the lower courts sustaining the position as recited in the said opinion, but a number of rulings by other lower federal courts could be cited to the contrary. None of the questions here involved were before this court in Francis vs. McNeal, 228 U. S. 695, for in the said cited case the petitioner was a creditor in an involuntary proceeding and the resisting partner and respondent was held by this Court to have estopped himself by his own prior acts and agreements as appeared from the record; thus waiving all his status as a non-assenting partner.

Nor can it be fairly argued from the wording of Section 5c that the provisions of the prior Act of 1867 omitted from the Act of 1898 shall be read into it, for that is merely a proper provision to enable one district court, which has already jurisdiction, under the statute, over the partnership and one or more of the partners, to take jurisdiction over all

the remaining partners whether they happen to reside within that particular district or not.

Still more unsatisfactory is the reasoning in the opinion on the effect of the death of Lavina Katherine Harris. In fact, this phase of the question is really not discussed or fairly met in the said opinion. There is no attempt to meet the objections of the authorities holding to the contrary and no light or suggestion given to regulate the practice.

We, therefore, urge upon this Court the necessity of a careful revision, because the questions raised herein are of the widest public interest; because none of them have been finally determined in the highest court of the land; because no other tribunal than this one can frankly discuss whether or not General Order No. VIII is judicial or legislative in its essence; because there is pressing need for a uniform system and interpretation of the questions here raised in all of the several courts of this country; and because we believe the order and decree of the courts below is in violation of the fundamental rights of the petitioner as a citizen.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

R. L. BIGELOW,
Hazleton, Pa.

ELLIS L. ORVIS,
Bellefonte, Pa.

Attorneys for Petitioner.

September 22nd, 1923.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 2945 **March Term, 1923**

GEORGE R. MEEK,

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts.

No. 2946 **March Term, 1923**

FLORENCE F. DALE,

vs.

SAME

No. 2971 **March Term, 1923**

ANDREW BREEZE,

vs.

SAME

Petitions for Review from the District Court of the United States for the Middle District of Pennsylvania.

Before BUFFINGTON and DAVIS, Circuit Judges, and McKEEHAN, District Judge.

DAVIS, C. J.:

All three of these cases were argued together.

The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her Estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoenas on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5a and c, of the Act of 1898 provides that:

(a) "A partnership, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(c) The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

"Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not to voluntary petitions in bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5

of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires us to hold that it did? If the Act of 1898 had provided that "a partnership may be adjudged a bankrupt" on the petition of "any creditor," this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "any one" of the partners, and by "any creditor." The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that:

"Any member of a partnership who refuses to join in the petition—shall be entitled to resist the prayer" etc. By the words "join in," the Supreme Court had in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in." Judge Lowell held in the case of In re Forbes et al, 128 Fed. 137, 140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis vs. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other

to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong vs. Fisher et al, 224 Fed. 97; Francis vs. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth vs. Slipper et al, 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question!" Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al vs. Security Bank of Memphis et al, 130 Fed. 436, 442. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is

AFFIRMED.

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25 Corpus Juris, Note 17 (c), page 220

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Section 5, of the Bankruptcy Act of 1898

General Order No. VIII, promulgated by the Supreme Court

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1923

ANDREW BREEZE *Petitioner,* *vs* CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts. *Respondents.*	Notice of Motion, Docket No.

To N. B. SPANGLER,
S. D. GETTIG,
Bellefonte, Pa.

Attorneys for Centre County Banking Company and John M. Shugert, Respondents:

Gentlemen:

Please take notice that upon a certified copy of the transcript of record in the above stated case, including the proceedings had in the Circuit Court of Appeals for the 3rd Circuit, and upon the annexed petition of Andrew Breeze, sworn to on the 11th day of September, 1923, we shall make the motion hereto annexed before the Supreme Court of

the United States at the Capitol in the City of Washington on the 8th day of October, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Yours, Etc.,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
Bellefonte, Pa.
Attorneys for Petitioner.

AND NOW September 11th, 1923, we hereby accept service of the above notice and annexed petition.

N. B. SPANGLER,
Atty for Creditors' Committee.

S. D. GETTIG,
Atty for John M. Shugert, et al.

ANDREW BREEZE
Petitioner,
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts,
Respondents.

Motion for Certiorari.

And now comes the petitioner, Andrew Breeze, by his counsel, Mortimer C. Rhone (with him Ellis L. Orvis) duly admitted to practice in the Supreme Court of the United States, and moves your Honorable Court upon a certified copy of the transcript of the record in the above stated case, including the proceedings had in the Circuit Court of Appeals of the United States for the 3rd Circuit and upon the annexed petition sworn to on the 11th day of September, 1923, for a writ of certiorari directed to the Circuit Court of Appeals of the United States for the 3rd Circuit, and to the District Court of the United States for the Middle District of Pennsylvania, to bring before your Honorable Court the case of Andrew Breeze, petitioner, vs. Centre County Banking Company, a partnership and John M. Shugert, individually, bankrupts No. 2971, March Term, 1923, in the Circuit Court of Appeals of the United States for the 3rd Circuit recently decided by said Circuit Court of Appeals, and by the District Court of the United States for the Middle District of Pennsylvania, for such proceed-

ings therein as to this Court may seem just, and for such other further relief in the premises as may be just.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
Bellefonte, Pa.
Counsel for Petitioner.

ANDREW BREEZE
Petitioner
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.
Respondents.

Petition for Writ of Certiorari.

TO THE HONORABLE,
THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Andrew Breeze respectfully represents as follows:

FIRST: That heretofore, to wit on August

26th, 1922, the said John M. Shugert filed in the District Court of the United States for the Middle District of Pennsylvania, Docket No. 4268, an amended involuntary petition in bankruptcy (see record page 56) wherein he averred inter alia that he as an individual was insolvent; that the Centre County Banking Company, a partnership composed of himself, George R. Meek, Florence F. Dale, Andrew Breeze, Mary Harris, then living and Lavina Katherine Harris, then deceased, was likewise insolvent, and that each of said partners were insolvent and jointly and severally unable to pay the partnership debts; that the estate of Lavina Katherine Harris, a former partner, who died January 10, 1921, was in the custody of the Orphans' Court of Centre County, and of which estate John Blanchard and Sarah C. Brown were her executors.

The prayer of the petition is

"That such partnership as well as Geo. R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt within the purview of such bankruptcy law of 1898 as amended, and that service of this petition be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings may be had as are provided in said law and General Order VIII, of the Supreme Court as the Court may order."

SECOND: That your petitioner moved to dismiss the said petition in bankruptcy upon grounds stated therein (record 65).

A. That the District Court was without jurisdiction to allow or determine an involuntary petition

in bankruptcy against this petitioner filed by the said John M. Shugert.

B. That an involuntary petition in bankruptcy could only be filed and prosecuted by the required number of creditors and that only upon a proper averment that the petitioner had committed one or more of the several acts of bankruptcy defined in the Bankruptcy Act.

C. That the original petition filed by Shugert was a voluntary one on his part and the amended petition being a combination voluntary and involuntary petition the amendment was improperly allowed.

D. That where it appears upon the record that prior to the filing of a petition in bankruptcy by a surviving partner that the partnership was dissolved by operation of law by the death of one of the partners, and whose Estate was then in process of administration in the Probate Court, a surviving partner could not institute bankruptcy proceedings against the partnership.

E. That in the Bankruptcy Act of 1898 one partner cannot without the consent of his other partners institute bankruptcy proceedings to have the partnership declared bankrupt.

F. That insofar as General Order No. VIII of the Supreme Court of the United States attempts to confer jurisdiction upon Courts of Bankruptcy to adjudicate as bankrupts non-consenting partners, who refuse to join in a bankruptcy petition instituted by one partner, said General Order is in effect legislation at variance with the statute itself, and the enforcement of such order against your petitioner would be denying him the equal protection of the laws and amount to the taking of his property without due process of law.

THIRD: After argument had upon the motion to dismiss the Honorable Charles B. Witmer District Judge allowed the amended petition to be filed and directed a subpoena to issue as prayed for therein, and a subpoena was issued and served upon your petitioner (record 60) requiring him "to answer a petition filed by John M. Shugert in our said Court praying that you may be adjudged a bankrupt and to do further and receive that which our said District Court shall consider in your behalf."

FOURTH: The petitioner after this subpoena was issued appeared specially and for the purpose only of quashing the subpoena and to dismiss the amended petition upon the grounds above stated, which motions were denied by the District Court, and a petition to revise in matter of law was filed in the Circuit Court of Appeals, and that Court in an opinion by Judge Davis affirmed the order of the District Court. See opinion, page 42.

FIFTH: As the record now stands the District Court of the United States for the Middle District of Pennsylvania and the Circuit Court of Appeals for the 3rd Circuit have decided the following propositions of law which will be hereafter binding in the 3rd circuit at least, unless application for this writ of certiorari shall be granted and the orders so made reversed by the Supreme Court:

A. That one partner may without the consent and against the protest of the other partners institute and prosecute a bankruptcy proceeding against the partnership.

B. That one partner may maintain an involuntary petition in bankruptcy against his other partners without setting forth therein any of the Acts of

Bankruptcy defined in the statute, and notwithstanding the terms of the statute, which provide that only creditors may maintain involuntary bankruptcy proceedings.

C. That a surviving partner may institute bankruptcy proceedings to have the partnership declared bankrupt even where it appears upon the face of the petition so filed that several months prior thereto the partnership was dissolved by operation of law, viz., the death of one of the partners, and such partner's Estate is then being administered in the State Probate Court.

D. That the authority of the above propositions of law upon which the decision of the Circuit Court of Appeals and the District Court was founded, is General Order No. VIII promulgated by the Supreme Court after the passage of the Act of 1898, and which order is in almost identical language with that of General Order No. 18 made after the passage of the Act of 1867, which Act expressly provided that one partner might file a petition to have the partnership adjudged a bankrupt.

SIXTH: Your petitioner contends that the District Court and the Circuit Court of Appeals erred in refusing to quash the subpoena and dismiss the petition in bankruptcy vs. your petitioner and the partnership and that the decision of both Courts is at variance with the provisions of the bankruptcy statute, and of the following decisions of the Federal Courts upon the questions which Federal Courts have passed upon that are raised in this record, viz.,

Arthur vs. Cumming 91 U. S. 362.
Hobbs vs. McLean 117 U. S. 567.
25 Corpus Juris, note 17 (c) page 220.

Deckert vs. Filbert 3 W & S 454.
Hall vs. Lanning 91 U. S. 160; 23 L. E. 271.
Yonley vs. Lavender 88 U. S. 276; 22L E. 536.
In re Fackleman 41 A. B. R. 14; 248 Fed. 565.
In re Evans 20 A. B. R. 406; 16 Fed. 590.
In re Temple Fed. Cases No. 1-13825 and recorded in Vol. 23, Fed. cases at page 835.

Whereas the Circuit Court of Appeals and the District Court held that the case at bar is ruled by the following authorities.

Section 5 of the Bankruptcy Act of 1898.

General Order No. VIII promulgated by the Supreme Court.

In re Forbes et al, 128 Fed. 137-140.
Francis vs. McNeal 228 U. S. 695.
Armstrong vs. Fisher et al 224 Fed. 227.
Yungbluth vs. Slipper et al 185 Fed. 773.
Vaccaro et al vs. Secretary Bank of Memphis 130 Fed. 436-442.
In re Stem & Company 127 Fed. 547.

SEVENTH: That the questions that your petitioner desires among other things to have decided in this Court are as stated in the brief filed in the Circuit Court of Appeals as follows:

1. "Jurisdiction of the Bankruptcy Court to issue a subpoena upon the voluntary petition of one partner requiring remaining partners to show cause why they should not be adjudicated bankrupts individually.

2. Jurisdiction of the Bankruptcy Court to adjudicate a partnership bankrupt upon the sole

petition of one partner without the consent or assent of remaining partners.

3. Jurisdiction of the Bankruptcy Court to hear and determine a petition in bankruptcy filed by one partner to have the partnership adjudicated a bankrupt without consent or assent of remaining partners, where it appears upon the face of the petition that one of the alleged partners' Estate is then being administered in the Orphans' Court.

4. Scope of, and interpretation of the provisions of General Order No. VIII as applied to the case at bar."

EIGHTH: Herewith filed is the certified transcript of the record of the proceedings in the Circuit Court of Appeals for the 3rd Circuit and in the District Court of the United States for the Middle District of Pennsylvania, together with certified copies of the opinions of said Courts and of the order made by said Circuit Court of Appeals affirming the judgment of the District Court.

WHEREFORE your petitioner prays your Honorable Court to issue a writ of certiorari to the Circuit Court of Appeals of the United States for the 3rd Circuit, and the District Court of the United States for the Middle District of Pennsylvania, to send up the record in said case to the end that the manifold errors herein complained of may be corrected, and the order made by each of said courts be reversed and the petition to revise in matter of law

granted, and for such other and further relief as to your Honorable Court may seem just.

ANDREW BREEZE
by Ellis L. Orvis, his Attorney.

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
Bellefonte, Pa.

Attorneys for Petitioner.

Dated at Bellefonte, Pa., September 11th, 1923.

State of Pennsylvania
County of Centre ss

Ellis L. Orvis attorney for Andrew Breeze being duly sworn deposes and says that he has read the foregoing petition and knows the facts therein set forth and the same are true to the best of his knowledge, information and belief, and that he believes them to be true.

ELLIS L. ORVIS

Sworn and subscribed to before me this 11th day of September, 1923.

BELLE WEAVER,

Notary Public.
My Commission expires February 2nd, 1925.
(SEAL)

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1923.

ANDREW BREEZE

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.

Petitioner's Brief

STATEMENT OF THE CASE.

John M. Shugert filed a petition in bankruptcy in the Middle District of Pennsylvania in which he sets forth that he individually is insolvent and that he "George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze who survive Lavina Katherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, with its principal place of business at Bellefonte, Pa.," and that the partnership is likewise insolvent. He further avers that "Lavina Katherine Harris who in her lifetime was a partner died on the 10th day of January, 1921, and that her estate is now being administered" in the Orphans' Court of Centre County, Pa. This original petition filed the 30th day of June, 1922, prayed

for a subpoena which was awarded and served upon the surviving other partners. That the petitioner and his co-respondents moved to quash and set aside the said subpoena upon the grounds, inter alia, that it was not responsive to the prayer of the petitioner in that it required the remaining living partners to show cause why each of them should not be individually adjudicated a bankrupt.

This motion to quash and dismiss was sustained in the District Court. But on the same day the petitioner (Shugert) was allowed to amend his original petition so as to read as follows:

> "Such partnership as well as the said George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt * * * * that service of the petition, together with a subpoena be made upon the said George R. Meek, and other respondents, and that proceedings be had as provided in the Bankruptcy Act and General Order No. VIII."

About the same time, or shortly thereafter, the District Court appointed Ivan Walker Esq., Temporary Receiver of the partnership, so that said partnership assets are now being collected and conserved.

Following the filing of this amended petition a subpoena was issued (record 60) addressed "to George R. Meek, Mary C. Harris, Florence F. Dale

and Andrew Breeze, surviving partners of Lavina Katherine Harris, deceased, individually and trading as Centre County Banking Company," by the terms of which each of said individuals is required to appear to answer the petition filed by Shugert and **show cause why they as individuals** should not be adjudged bankrupts, and why said partnership should not be adjudged bankrupt.

George R. Meek, Florence F. Dale and Andrew Breeze filed their several motions to dismiss this amended petition and quash the subpoena for reasons set forth in the motion (record 65), this motion having been filed October 3, 1922.

The District Court without an opinion, denied the motion to dismiss, whereupon these three petitioners presented a petition to the Circuit Court of Appeals for the 3rd Circuit to revise the order of the District Court, and after argument thereon the Circuit Court of Appeals affirmed the order of the Court below, and these petitioners now ask this Court to issue a writ of certiorari to the Circuit Court of Appeals and the District Court to correct the errors complained of in the motion and brief filed.

Several questions of law are raised by the record that are novel, of wide public interest, and never heretofore analytically discussed and determined by this Court. So far as we can ascertain some of them have never been raised. There is a conflict of authority in the lower courts upon all these questions. As to the one involved by the death of Lavina

Katherine Harris upon the jurisdiction of the bankruptcy courts, an apparent conflict of authorities is admitted in the opinion of his Honor Judge Davis of the Circuit Court of Appeals.

So far as our search goes among the reported cases no partner has anywhere asked that his non-assenting co-partners shall be declared **individually** bankrupt, at least there is no authoritative decision that he may lawfully do so especially when he fails to aver that he is a creditor of the said remaining partners.

The questions involved are not only unique and novel because of their intrinsic importance and the lack of direct authoritative rulings thereon, but are rendered much more so by the attempt to combine in one procedure a voluntary bankruptcy with the involuntary bankruptcy both of the partnership itself and of the resisting surviving partners, and that too, without the intervention of a single creditor either of the petitioner, the partnership, or of the remaining members of the partnership.

But this does not state the whole of the complex problem thus created because the record further shows the additional complication caused by the prior death of Lavina Katherine Harris, thereby creating a conflict of jurisdiction between the Pennsylvania Probate Court, which has exclusive jurisdiction over the estates of decedents, and the Federal Court sitting in bankruptcy.

POINTS

I

THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS BY THE DECISION IN THIS CASE HOLD THAT ONE PARTNER MAY WITHOUT THE CONSENT AND AGAINST THE PROTEST OF HIS OTHER PARTNERS INSTITUTE AND PROSECUTE A BANKRUPTCY PROCEEDING AGAINST THE PARTNERSHIP.

These petitioners contend that there is no authority in the Bankruptcy Act of 1898 or the amendments thereto which will warrant any such proceeding because there is no statutory authority for it. Bankruptcy proceedings are in derogation of the common law and the provisions of such acts of the Legislature are to be strictly construed.

The Bankruptcy Act of 1867 specifically authorized the filing of a voluntary petition by any one of the partners. The language in that Act being, Section 36.

> 'Where two or more persons who are partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them or on the petition of any creditor of the partners, a warrant shall issue, etc.'

Since Congress in the Act of 1867 expressly provided that a voluntary bankruptcy proceeding by the partnership might be instituted by any one of

the partners and did not in the Act of 1898 incorporate any such provisions, under well known rules for the interpretation of statutes, the presumption is that Congress intentionally omitted this provision, and having omitted it no such power is conferred by the Act of 1898.

There is no reason to assume that Congress omitted the 36th Section of the Act of 1867 from the present Bankrupt Act of 1898 by mistake or oversight. There is obviously a change in the legislative policy; caused by the numerous decisions in the federal courts criticising the unfortunate results arising from the presence of Section 36 in the older Act. It was recognized that the practice under said Section opened an easy door to rapacious and designing persons to oppress and harass their partners; besides in too many instances it made the bankruptcy practice intricate and cumbersome by reason of the collateral issues of law and fact thus introduceable.

The maxim borrowed from the Roman law *expressio unius est exclusio alterius* is so universally accepted as "A well settled legal maxim" and "The well establishd principle or maxim of law," and "As that universal and familiar rule" and "A rule both of law and equity," and "The well known maxim of construction and a very sound one;" that it would be an affectation to quote any of the multiplicity of authorities whether Federal, State, or of the English Courts.

We will limit ourselves to apply this maxim in

discussing the inclusion of Clause 36 in the earlier statute and its exclusion or any provision analagous thereto from the present bankrupt act.

"No maxim of the law is of more general and uniform application and it is never more applicable than in the construction and interpretation of statutes;" and "The maxim was never more applicable than when applied to the interpretation of a statute that *expressio unius est exclusio alterius.*"

Broom's Legal Maxims, 8th Edition, page 663.

We must bear in mind that the Act of 1898 was not a repeal, amendment or a supplement to the Act of 1867, for that Act had expired by its own limitations; however much of its provisions were reincorporated in the present legislation, and the rejection of Section 36 emphasizes the reason for applying the maxim above quoted and indeed necessitates its application.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

25 Corpus Juris note "17 (c)" page 220.

State vs. Tucson Gas Company, 15 Arizona, 294.

New Haven vs. Whitney, 36 Conn., 374.

Township vs. Dubuque, 7 Iowa, 262.

Scott vs. Ford, 52 Or., 288.

While the Act of 1898 as just above stated has

not repealed the earlier Act of Congress, it is in fact a recodification, and its failure to include either Section 36 of the Act of 1867 or any similar provision implies in the strongest manner a negative.

"Possibly the strongest implication of a negative is found where subsequent statutes revise the whole matter of former ones."

Endlich on the Interpretation of Statutes, page 270.

So Mr. Justice Swain in delivering the opinion of the Supreme Court of the United States upon the construction of a revenue statute ruled that "The maxim *expressio unius est exclusio alterius* applies with cogent effect. This view is conclusive unless it is overcome by something else found in the statute."

Arthur vs. Cumming, 91 U. S. 362.

As Congress in 1898 refused to enact that "Partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them, a warrant shall issue," and the statute under which we are now living entirely omits any proceeding in bankruptcy by one partner against another, how can it be argued that our present legislation on bankruptcy provides for a procedure such as we have at bar, though formerly authorized by a statute now defunct, but expressly excluded from the Act of 1898? All the powers of the bankrupt court, all procedures to be followed therein are of statu-

tory origin and all its jurisdiction rests exclusively upon the statute of 1898 alone.

Hobbs vs. McLean, 117 U. S. 567.

The Supreme Court in the case of Hobbs vs. McLean 117 U. S. 567; 29 L. E. 940, said upon this question:

'Where a provision is left out of a statute either by design or by mistake of the legislator, the Courts have no power to supply it. To do so would be to legislate and not to construe.' "

II

POWER AND AUTHORITY OF PARTNERS.

The fundamental law relating to partnership in force throughout the United States and the rule in the Federal Courts is that:

> Unless authorized by the other partners or unless they have abandoned the business one or more but less than all the partners have no authority to—
>
> (A) Assign the partnership property in trust for creditors on the assignee's promise to pay the debts of the partnership.
>
> (B) Dispose of the good will of the business.
>
> (C) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(D) Confess a judgment.

(E) Submit a partnership claim or liability to arbitration or reference.

The Supreme Court of Pennsylvania many years ago decided in Dickert vs. Filbert 3 W. & S. 454 that one partner after the dissolution of partnership has no power to make a voluntary assignment of the effects of the partnership for the benefit of creditors without the consent of his co-partners.

The Supreme Court of the United States in Hall vs. Lanning 91 U. S. 160; 23 L. E. 271 decided that,

> "After the dissolution of a co-partnership one of the partners in a suit brought against the firm has no authority to enter an appearance for the partners who do not reside in the State where the suit is brought and have not been served with process."

Justice Bradley who delivered the opinion of the Court uses this language therein:

> "In the case of Bell vs. Morrison, 1 Peters 351 this court decided upon elaborate examination that after a dissolution of the partnership one partner cannot by his admissions or promises bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt. It is well settled by numberless cases even before dissolution one partner cannot confess judgment or submit to arbitration so as to bind his co-partners. It is well settled that after dissolution one partner cannot bind his co-partners by any contract or securities or impose upon them a fresh liability.

> Appearance to a suit does impose a fresh liability * * * * on principle therefore it is difficult to see how after dissolution one partner can claim implied authority to appear for his co-partners in a suit brought against this firm."

We say that it is certainly quite as grave an act upon the part of one partner to file a voluntary petition in bankruptcy in the partnership name without express statutory authority so to do, as it is to enter an appearance or submit a question to arbitration or to confess a judgment. In fact the filing of a voluntary petition in bankruptcy carries with it a confession of judgment because a decree of adjudication immediately follows and settles for all time by a judgment of the court that the partnership is insolvent. To use the language of Justice Bradley it is therefore upon principle difficult to see how after a dissolution of the partnership one partner can plunge the partnership into a voluntary proceeding in the absence of express authority so to do.

We respectfully submit that under the above authorities the District Court and the Circuit Court of Appeals erred in the orders made in this case.

III

AN INVOLUNTARY PETITION IN BANKRUPTCY CANNOT BE INSTITUTED AGAINST INDIVIDUALS UPON THE PETITION OF ONE ASSERTING HIMSELF TO BE A PARTNER IN

TRADE WITH THE INDIVIDUALS PROCEEDED AGAINST.

The bankruptcy act of 1898 declares that there shall be two kinds of bankruptcy, voluntary and involuntary. See Section 4.

The voluntary petition is instituted by the bankrupt himself by filing in court his petition and attaching thereto the schedules of his property and it makes no difference whether he is solvent or insolvent, for even a solvent person has a right to surrender his property to the bankruptcy court and have it administered therein. Collier on bankruptcy 12 Edition, page 141.

We concede that the several persons who constitute a partnership may agree among themselves to liquidate said partnership, whether solvent or insolvent, in the bankruptcy court; but we deny that one partner, against the consent of his co-partners, can institute a voluntary petition in bankruptcy for the partnership; much less can he do so as against his co-partners as individuals, notwithstanding the peculiar provisions of the defunct Act of 1867; because said provisions of the Act of 1867 are not embodied in the present act of 1898, but are omitted therefrom and because the said act of John M. Shugert in attempting so to do is a wrongful act, forbidden by the Pennsylvania Statute on partnerships as well as by the general law, because the said at-

tempted act of a partner necessarily would destroy the business of the partnership.

An involuntary proceeding can only be instituted by creditors against a person, firm or corporation (not excepted in clause B. of Section 4) that may owe debts of $1,000.00 or over and has committed one of the acts of bankruptcy specified in Section 3. The act further prescribes that in the case of the involuntary petition there shall be three or more creditors who have claims in excess of securities held by them in the aggregate amounting to $500.00 or over, unless it shall appear that there are less than twelve creditors in which case one creditor whose claim amounts to $1,000.00 or over may file such petition. Section 59.

The petition in this case is a multifarious affair. Shugert in his original petition first of all seeks to have himself adjudged a bankrupt individually. Then follows a prayer for the adjudication of a partnership which Shugert alleges to exist. Now in the amended petition, he attempts to institute against Meek and his other surviving partners an involuntary proceeding and prays that they may be adjudicated bankrupts **individually.** We say there is no authority in the bankruptcy act for any such three-cornered proceeding, nor is there any provision in the bankruptcy act which authorizes one partner to file an involuntary petition against his other partners.

Opposing counsel contend that authority for this proceeding is found in the case of Francis vs. McNeal 228 U. S. 695, 57 L. E. 1029, and the Circuit Court of Appeals seem to hold that this case controls the case at bar. A careful analysis of Francis vs. McNeal will disclose that it is not authority for the present proceeding.

Two questions were decided in this case:

1. That where an involuntary petition is filed against a partnership it must be alleged and proved not only that the partnership is insolvent but also that all the individual members of the partnership are also insolvent. That is to say that the aggregate property of all the partners and of the partnership is not sufficient to pay the debts of the partnership and the individual debts of the partners.

2. The Court decided that where an involuntary petition was filed against the partnership and the partnership was adjudicated a bankrupt the Court has jurisdiction to compel the other partners to file schedules of their property as provided in General Order No. VIII and if it shall be found that the aggregate property of both partnerships and individuals is not sufficient to pay all the debts, that the bankruptcy court has jurisdiction to administer the individual property of the individual partners.

The material difference between these two cases is that in Francis vs. McNeal an **involuntary** petition

was filed by the creditors, while in the case at bar a voluntary petition was filed by one partner, and that is the very thing we contend cannot be done where the purpose of the petition is to bring about the adjudication in bankruptcy of individuals, which we say can only be done by an involuntary petition filed by creditors.

IV.

PROBATE COURTS HAVE EXCLUSIVE JURISDICTION TO ADMINISTER THE ASSETS OF DECEASED PERSONS.

Both the original petition and the amended petion filed in this case state that—

> "Lavinia Katherine Harris (who in her life time was a partner in this business) died on or about the 10th day of January, A. D. 1921, and her estate will be administered by the Orphan's Court of Centre County upon the filing of the account by her executors."

And in the prayer of the petition it is stated that George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze are "Surviving partners of Lavinia Katherine Harris, deceased."

The Supreme Court of the United States long ago recognized the principle that the Probate Courts of the several States have full and exclusive control over the estates of deceased persons. In the case of Yonley vs. Lavender 88 U. S. 276; 22 L. E. 536 the

Supreme Court uses this language:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas (the same is true in Pennsylvania) the probate of wills and the grant of letters testamentary and of administration are matters entirely within the jurisdiction of the Probate Court. The legal effect of granting letters testamentary or of administration is to place the whole estate real and personal within the custody of the law and leave it there until the administration has been completed. In this way the assets are preserved that there may be a fair and equal division of them among the several creditors according to a scale of priority fixed by law * * * * all demands against deceased persons which are not liens upon specific property before the death of the debtor can only be collected by being brought under the administration of the Probate Court."

The Court then further considers the question in connection with the jurisdiction of the Orphans' Court in the State of Mississippi and cited the case of Williams vs. Benedict, 8 Howard 107. "The jurisdiction of the Orphan's Court had attached to the assets; they were in *gremio legis* and could not be seized by process from another Court."

We contend that the same rule of law prevails in connection with the bankruptcy law and that where one of the partners dies, thereafter the estate of such partner cannot be adjudged a bankrupt and it necessarily follows that there can be no bankrupt-

cy adjudication against the partnership one member of which is dead.

Collier on bankruptcy 12th Edition, Page 175.

Collier says that there is a conflict of authority upon this question, but he also recognizes the principle above quoted concerning the jurisdiction of the Probate Court and in discussing this case says:

> "The only difficulty had upon adjudication in such a case is the consequent interference with the administration of the Probate Court of the estate of the deceased partner. In the above absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the Probate Court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than to denial of justice."

The Supreme Court of the United States has apparently not passed upon the question but there are a number of well considered cases which hold in accordance with the text in Collier just quoted.

In the case of Fackleman 41 A. B. R. 14; 248 Fed. 565 the matter is passed upon by Judge Bledsoe, Southern District of California, and he uses this language—

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labored under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

The precise question under consideration here was passed upon by Judge Newman in the Northern District of Georgia, in the case of Evans, 20 A. B. R. 406; 16 Fed. 590 in which case he held,

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

This was also the decision of the courts under the bankruptcy act of 1867 the leading case upon the subject being in re Temple, Fed. Case No. 1 13825 and reported in 23 Fed. cases at page 835.

In this case Temple was a member of two partnership firms viz.:—Temple & Workman and Temple & Ledyard. He averred that both firms were insolvent and attached his individual schedule and the schedules of both firms. Adjudication followed and Temple as an individual and both partnerships were adjudged bankrupts.

After the petition in bankruptcy was filed and the adjudication made a creditor filed a bill in equity in the district court of California in behalf of himself and other creditors, in which it is set forth that both firms were insolvent and that Temple and the firm of Temple & Workman with intent to defeat the operation of the bankrupt laws had made an assignment of all their individual and partnership assets.

Temple likewise made an assignment of the as-

sets of Temple & Ledyard in trust for the satisfaction of creditors. It is further stated that assignees had taken possession of the property under circumstances which charged them with notice of the fact of insolvency.

The prayer of the bill is that in view of the fact that no assignee in bankruptcy had been appointed that (the assignees) Freeman and Spence might be enjoined from making any disposition or transfer of the assets conveyed to them under the assignment and that they be decreed to hold the same in trust for the assignee in bankruptcy to be elected.

The defendants, Freeman and Spence, the assignees referred to, filed a general demurrer and the Court in passing upon the question said:—

> "It is clear that the action of the register (the bankruptcy officer who made the adjudication under the act of 1867) adjudicating the firm of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard as expressly required by rule 18 of the Supreme Court and Workman was dead at the time the court would commence proceedings. * * * * The act speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors notwithstanding a former dissolution inter sese where there are joint assets and joint creditors it has never been held that a partnership dissolved by the death of one of the partners can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws. * * * The status of a deceased person cannot be passed upon by a bank-

ruptcy court nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partners."

We therefore say to the Court that it appearing from the averments in both the original and amended petitions of John M. Shugert that the said petitioner, Meek, Breeze and Mrs. Dale are surviving partners of Mrs. Lavinia Harris and that the latter died in January, 1921, and her estate is now being administered in the Orphan's Court of Centre County, it necessarily follows that the District Court below is without jurisdiction and the said petitions should be dismissed."

V.

SCOPE OF, AND INTERPRETATION OF THE PROVISIONS OF GENERAL ORDER NO. VIII AS APPLIED TO THE CASE AT BAR.

The foundation for this whole proceeding is section 5 of the Bankruptcy Act of 1898 as supplemented by the provisions of General Order No. VIII.

Section 5 provides:—

(A) "A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.

(B) The court of bankruptcy which has juris-

diction over one of the partners may have jurisdiction over all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides:—

"Any member of a partnership who refuses to join in the petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defense which any debtor proceeded against is entitled to take by the provision of the act."

General Order No. VIII is practically a repetition of General Order No. XVIII of the act of 1867, which act expressly provided that a subpoena in bankruptcy might issue either on the petition of the partners or **any one of them.** This provision having been omitted from the Act of 1898 we believe that the provisions of General Order No. VIII are broader than the act itself and insofar as its provisions are inconsistent with the Act itself it must abate.

We contend that Section B quoted above relates to the venue and is territorial in its application.

That is to say that if an involuntary petition in bankruptcy be filed by creditors against the partnership that the court in which the same is filed shall have jurisdiction over all the partners even though some of them live beyond the jurisdiction of the court in which the petition is filed. It certainly is not authority for the proposition that one partner contrary to the fundamental law governing partnerships may institute a proceeding that will destroy the partnership. One partner cannot make an assignment of the partnership assets; dispose of the good will of the business; do any act which would make it impossible to carry on the ordinary business of the partnership, or confess a judgment against the partnership.

It appears upon the face of this petition that more than six months prior to the filing of the petition the partnership was dissolved by operation of law (the death of Lavina Katherine Harris) and that her estate is being administered in the Probate Court. Whether her estate is solvent or insolvent does not appear and there is no averment in the petition itself regarding this matter. Just when this estate will be finally administered nobody knows. The other partners are entitled to have her estate duly administered before any liability is fixed upon them for the debts of the Centre County Banking Company. That is to say their liability cannot be measured until the exact status of the estate of this dead woman shall be ascertained, and there is no

provision in the law authorizing a trustee in bankruptcy to intervene in this estate, and at least two District Courts have held that where this situation arises there cannot be any bankruptcy proceedings against a partnership.

In the discussion of the foregoing points we have not commented on the reasons appearing in the opinion of the Circuit Court of Appeals affirming the order of the District Court. We have all along realized that courts of lower and intermediary jurisdiction would feel that Order No. VIII authorized by this Court would be more or less mandatory upon them. Thus it will appear from the said opinion that it is largely based upon its construction of said order as regulating the procedure under the Bankrupt Act of 1898. It would, therefore, seem to us all the more necessary that this Court shall decide in an adjudicated case whether or not the said lower Court's construction of General Order No. VIII is authorized by our present bankruptcy legislation, and especially whether the construction placed upon it by the lower courts in this case comes within the spirit and express legislation of Congress. We do not believe that this Court in said General Order had the purpose or intention of legislating the omitted provisions of the Bankruptcy Act of 1867 into the present Bankruptcy Act; nor do we concede that the strained construction placed upon said General Order, by the lower courts, in this case, is the proper and consistent one to carry out the real purposes thereof.

The learned court below establishes a basis for its reasoning by an implication that because the Act provides that "a partnership may be adjudged a bankrupt"—that it may be so adjudged by a process not authorized by the Act itself. To our mind this is a reversal of all the rules of statutory construction. There is clearly no intention of enlarging in the language of Section 5 of the Act of 1898 the jurisdictional power of the Federal Courts or of creating a process other than that explicitly laid down in the Act itself, and the learned Judge is driven to re-enforce his reason by calling in General Order No. VIII. It is true that there are some decisions in the lower courts sustaining the position as recited in the said opinion, but a number of rulings by other lower federal courts could be cited to the contrary. None of the questions here involved were before this court in Francis vs. McNeal, 228 U. S. 695, for in the said cited case the petitioner was a creditor in an involuntary proceeding and the resisting partner and respondent was held by this Court to have estopped himself by his own prior acts and agreements as appeared from the record; thus waiving all his status as a non-assenting partner.

Nor can it be fairly argued from the wording of Section 5c that the provisions of the prior Act of 1867 omitted from the Act of 1898 shall be read into it, for that is merely a proper provision to enable one district court, which has already jurisdiction, under the statute, over the partnership and one or more of the partners, to take jurisdiction over all

the remaining partners whether they happen to reside within that particular district or not.

Still more unsatisfactory is the reasoning in the opinion on the effect of the death of Lavina Katherine Harris. In fact, this phase of the question is really not discussed or fairly met in the said opinion. There is no attempt to meet the objections of the authorities holding to the contrary and no light or suggestion given to regulate the practice.

We, therefore, urge upon this Court the necessity of a careful revision, because the questions raised herein are of the widest public interest; because none of them have been finally determined in the highest court of the land; because no other tribunal than this one can frankly discuss whether or not General Order No. VIII is judicial or legislative in its essence; because there is pressing need for a uniform system and interpretation of the questions here raised in all of the several courts of this country; and because we believe the order and decree of the courts below is in violation of the fundamental rights of the petitioner as a citizen.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
Bellefonte, Pa.

Attorneys for Petitioner.

September 22nd, 1923.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 2945 **March Term, 1923**

GEORGE R. MEEK,

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts.

No. 2946 **March Term, 1923**

FLORENCE F. DALE,

vs.

SAME

No. 2971 **March Term, 1923**

ANDREW BREEZE,

vs.

SAME

Petitions for Review from the District Court of the United States for the Middle District of Pennsylvania.

Before BUFFINGTON and DAVIS, Circuit Judges, and McKEEHAN, District Judge.

DAVIS, C. J.:

All three of these cases were argued together.

The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her Estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoenas on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5a and c, of the Act of 1898 provides that:

(a) "A partnership, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(c) The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

"Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not to voluntary petitions in bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5

of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires us to hold that it did? If the Act of 1898 had provided that "a partnership may be adjudged a bankrupt" on the petition of "any creditor," this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "any one" of the partners, and by "any creditor." The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that:

"Any member of a partnership who refuses to join in the petition—shall be entitled to resist the prayer" etc. By the words "join in," the Supreme Court had in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in." Judge Lowell held in the case of In re Forbes et al, 128 Fed. 137, 140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis vs. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other

to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong vs. Fisher et al, 224 Fed. 97; Francis vs. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth vs. Slipper et al, 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question!" Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al vs. Security Bank of Memphis et al, 130 Fed. 436, 442. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is

AFFIRMED.

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Yungbluth *vs.* Slipper et al, 185 Fed. 773.

IN THE

Supreme Court of the United States

———:———

No. 590 **October Term, 1923**

GEORGE R. MEEK,

Petitioner,

v

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,

Respondents,

———

No. 591 **October Term, 1923**

FLORENCE F. DALE,

Petitioner,

v

SAME,

Respondents,

———

No. 592 **October Term, 1923**

ANDREW BREEZE,

Petitioner,

v

SAME,

Respondents,

———

Certiorari to Circuit Court of Appeals for the Third Circuit.

Statement of the Case.

John M. Shugert on June 30, 1922, filed a combination petition in bankruptcy, voluntary as to himself, but involuntary as to his alleged partners, in the Middle District of Pennsylvania (Record 8) in which he sets forth that he individually is insolvent and that he, "George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze who survived Lavinia Catherine Harris, now deceased, also a partner in her life time, are and have been partners under the style of Centre County Banking Company, with its principal place of business at Bellefonte, Pa." and that the partnership is likewise insolvent. He further avers that Lavinia Catherine Harris (who in her life time was a partner) died on the 10th day of January, 1921, and that her estate is now being administered in the Orphans' Court of Centre County, Pa. This original petition prayed for a subpœna which was awarded and served upon the surviving alleged other partners. The Respondents moved to quash and set aside the said subpœna upon the grounds, *inter alia*, that it was not responsive to the prayer of the petitioner in that it required the remaining living partners to show cause why each of them should not be individually adjudicated a bankrupt.

The District Court (Record 54) sustained the motion to quash the subpœna by an order entered September 15th, 1922, but on same day allowed petitioner to amend the prayer of his petition and directed a subpœna to issue as prayed for in the amended petition (Record 54).

The prayer in the original petition was:—

> "That such partnership and your petitioner as an individual and surviving partner of Lavinia Catherine Harris, deceased, may be adjudged bankrupts * * * * and that service of this petition with a subpœna be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze such non-consenting partners and that proceedings be had as are provided in said law and general order VIII of the Supreme Court and as the court may order."

The prayer in the amended petition (Record 58) is in the following language:—

> "That such partnership as well as George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner, surviving partners of Lavinia Catherine Harris, deceased, may each individually, as well as said Firm, be adjudged bankrupts and that service of this petition, with a subpœna, be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze such non-consenting partners, etc."

It will thus be seen that the prayer in the original proceedings was that Shugert, the petitioner, and the Centre County Banking Company a partnership, be adjudged bankrupt. The amended prayer is that Shugert and the other surviving partners of Lavinia Catherine Harris, deceased, *as individuals* should be adjudged bankrupts, as well as the Centre County Banking Company which Shugert alleged was a partnership composed of himself and the other respondents, who in turn survived Lavinia Catherine Harris who in her life time was a partner.

The Respondents, having therefore denied that they were in fact partners, then moved to quash the subpœna and dismiss the amended petition for reasons set forth in the motion (Record 65 and 74) which reasons may be briefly summarized as follows:—

(1) The Bankruptcy Court has no jurisdiction to adjudicate these respondents bankrupts individually upon the voluntary petition of Shugert and that this petition in bankruptcy so far as it effects Meek, Dale and Breeze is an in-

voluntary petition filed against them which does not set forth proper jurisdictional averments required to be incorporated in an involuntary petition.

(2) That the amendment should not have been allowed because the effect thereof was to substitute an involuntary petition in bankruptcy against individuals, for the voluntary petition originally filed.

(3) That it appears upon the face of the petition that the partnership was dissolved by the death of one of the partners before the petition was filed, whose estate is now in process of administration in the State Probate Court.

(4) That there is no authority in the Bankruptcy Act of 1898 conferring power or authority upon one partner to file a petition in bankruptcy in the partnership name, where said petition shows that one or more of the remaining partners do not assent or consent thereto.

(5) That General Order No. 8, if it be contended that it is authority for one partner to institute bankruptcy proceedings in the partnership name and in such proceedings to have adjudicated as bankrupts, individually, non-consenting partners who refuse to join in the bankruptcy petition thus instituted by one partner and have their individual property administered in the bankruptcy Court, is, in effect, legislation not authorized by Congress.

The District Court denied the motion to quash the subpœna and the amended petition, without opinion filed, from which order a petition to revise was filed in the Circuit Court of Appeals and that court affirmed the order and denied the petition to revise. It is upon this record that this court allowed the certiorari in each of these cases.

Questions Involved.

(1) Jurisdiction of a bankruptcy court to issue a subpœna upon a voluntary petition of one partner requiring non-consenting partners to show cause why they should not be adjudged bankrupts individually.

(2) Jurisdiction of a Bankruptcy Court to adjudicate a partnership bankrupt upon the sole petition of one partner without the consent of remaining partners, before dissolution or after dissolution by operation of law.

(3) Jurisdiction of a Bankruptcy Court to hear and determine a petition in bankruptcy filed by one partner to have the partnership adjudicated bankrupt without consent or assent of remaining partners, where it appears upon the face of the petition that, prior to the filing of the petition, as a result of the death of one of the alleged partners, the partnership was dissolved by operation of law, and the estate of such deceased partner is being administered in the State Probate Court.

(4) Scope and interpretation of the provisions of General Order No. 8 as applied to the case at bar.

(5) Is not a single procedure in bankruptcy against several respondents as individuals a misjoinder.

Specifications of Error.

(1) The District Court and the Circuit Court of Appeals erred in denying the motion of respondents (Petitioners) to quash the subpoena issued upon the amended petition. (Record 65-68).

(2) The District Court and the Circuit Court of Appeals erred in denying the motion of respondents (Petitioners) to dismiss the amended petition for reasons set forth therein. (Record 65–68).

(3) The District Court erred in denying the motion of respondents (Petitioners) to set aside the subpoena and dismiss the amended petition; the motion being, "Wherefore, respondent files this his motion to dismiss the said petition in bankruptcy and set aside the subpœna issued against him therein, at the cost of the said John M. Shugert * * * * " (for reasons assigned see Record 65-68), and the order and decree of said Court thereon being, "October 20, 1922, after argument and on due consideration the motion to dismiss is denied.

CHARLES B. WITMER,
District Judge."

(4) The Circuit Court of Appeals erred in denying the respondents' petition to revise in matter of law the order of the District Court denying the motion of respondents to set aside the subpoena and dismiss the amended petition; the prayer of said petition being, "Wherefore your petitioner, feeling aggrieved because of such order, asks that the same may be revised in matter of law by your Honorable Court as provided in Section 24 b of the Bankruptcy Law of 1898, as amended * * *" (for reasons assigned see Record 83-89), and the decree of

said Court thereon being, "The order appealed from is affirmed".

(5) The District Court and the Circuit Court of Appeals erred in holding that one partner might, without the consent or against the protest of remaining partners, institute voluntary proceedings in bankruptcy in the partnership name, and bring about an adjudication of bankruptcy against the partnership.

(6) The District Court and the Circuit Court of Appeals erred in holding that one partner might institute proceedings in bankruptcy to have remaining partners adjudicated bankrupts individually.

(7) The District Court and the Circuit Court of Appeals erred in holding that where it appears upon the face of the record that a partnership has been dissolved by the prior death of one of the partners, whose estate is being administered in the State Probate Court, another partner may institute proceedings in bankruptcy to have the partnership, and remaining partners individually, adjudicated bankrupts.

(8) The District Court has no jurisdiction to receive the combination petition in bankruptcy of this petitioner, praying for an adjudication of bankruptcy against himself personally, and also praying for a similar adjudication of bankruptcy against a partnership of which he is a member, his petition averring the non-consent of his alleged partners.

(9) The District Court has no jurisdiction to receive the combination petition in bankruptcy of this petitioner, praying: 1st, that he, himself, be adjudged a bankrupt; 2nd, that a partnership of which he is a member, be adjudged a bankrupt; and 3rd, that his non-consenting partners each be adjudged a bankrupt, individually.

Brief of Argument.

Banking corporations are not within the jurisdiction of bankrupt courts. They are excepted by the express language of the Act of 1898. Why is this legislative exception so expressed when such a wide range of corporations are made subject to the provisions of the Act? It can't be because of the mere fact of their being corporations, but because of the nature of the banking business. We, therefore, assume that it is against the policy of the law to subject banks as a class to the dangers of being harassed and embarrassed by the threats of depositors to throw them into bankruptcy. The Centre County Banking Company was, as its name indicates, in every business sense a bank of deposit and of general discount, and in fact differed from any other bank only in being a partnership. Why then strain the whole frame work of our bankrupt act to force this particular bank into a bankrupt court? Much less, why resort to judicial legislation that violates the fundamental laws of partnership and the express provisions of the Act of Congress in order to authorize this anomalous situation both in the pleadings and in the merits? The record reveals a most unusually new and anomalous procedure. A single partner by one petition prays that he, individually, may be adjudicated a bankrupt, and that the partnership be likewise so adjudicated. In his said petition he makes certain averments that establish the fact, that the partnership was in law dissolved by the prior death of one of the partners, whose estate was then being administered in the Orphans' (Probate) Court of Centre County, and that his petition was without the assent of his remaining partners, and fails to aver that he is a creditor. By an amended petition allowed in the court below he adds to this already complicated procedure a prayer for an adjudication of bankruptcy against each of his alleged partners as indi-

viduals, without averring any jurisdictional grounds therefor. To support this dragnet process, this Court is asked to legislate into the Act of Congress methods of procedure not expressed in the congressional legislation.

The reasons for avoiding such innovation are developed in the following discussion:

I

A COURT OF BANKRUPTCY HAS NO JURISDICTION TO ISSUE A SUBPOENA UPON A VOLUNTARY PETITION OF ONE PARTNER MADE AND FILED BY HIM IN THE PARTNERSHIP NAME REQUIRING NON-ASSENTING PARTNERS TO SHOW CAUSE WHY THEY SHOULD NOT BE ADJUDGED BANKRUPTS INDIVIDUALLY.

Two kinds of bankruptcy are provided for in the Act of 1898, Viz: Voluntary and Involuntary.

> "Any person except a municipal railroad, insurance, or a banking corporation, may become a voluntary bankrupt. Any natural person except a wage earner or a person engaged in farming or the tillage of the soil; any Unincorporated Company and any moneyed business or commercial Corporation except a Municipal railroad, insurance or banking corporation owing debts to the amount of $1000.00 or over may be adjudged an involuntary bankrupt. * * *"
>
> Bankruptcy Act of 1898 Section Four.

The first point we want to discuss here is the method of instituting involuntary as distinguished from voluntary proceedings.

Section three (b) provides that an involuntary petition may be filed against a person (the persons, firms and corporations mentioned in Section four above quoted) who is insolvent and has committed an act of bankruptcy with-

in four months after the commission of such act. Section three (a) defines what constitutes an act of bankruptcy.

Section 59 provides that involuntary petitions may be filed by three or more creditors who have provable claims aggregating at least $500.00 in excess of securities held by them; or if all of the creditors of the person to be proceeded against are less than twelve, then one creditor having a claim of $500.00 or over may institute the proceedings.

The voluntary petition may be instituted only by the bankrupt himself and we shall discuss this matter later on in this brief, where a partnership petition is filed. We want to limit this discussion to the question of the jurisdiction of the court to issue a subpœna upon a voluntary petition filed by one partner only, requiring remaining partners to show cause why they should not be adjudicated bankrupts individually.

Taking up the petition filed by Shugert in this case we find that he avers therein that (Record 56) it is the petition of John M. Shugert who respectfully shows that he and George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze who survived Lavinia Catherine Harris now deceased also a partner in her life time, are and have been partners under the style of Centre County Banking Company; that the principal place of business of the partnership is at Bellefonte, Centre County, Pennsylvania, that the partnership is insolvent and owes debts of $1000.00; That this petition was filed August 26, 1922, and the estate of said Lavinia Catherine Harris, deceased, is being administered by the Orphans' Court (The Probate Court of Pennsylvania) of Centre County; That Meek, Breeze and Mrs. Dale have not offered to join in said petition and that Shugert is not informed of their intention in said matter; that none of the partners are wage earners nor persons engaged in farming or tilling the soil, and that as individuals they owe debts which they are unable to pay in full; that there has been no final settlement of partnership business and that the debts of the partnership exceed $1000.00; that each of said partners is insolvent and they are jointly and

severally unable to pay the partnership debts; that attached to the petition is a schedule showing the debts of the partnership and an inventory of the partnership; that there are likewise attached schedules showing the debts of Shugert and an accurate inventory of his property.

Here then is a petition in bankruptcy filed by one man only, which contain all the jurisdictional averments required in an involuntary petition except.

(a) (There is no Act of Bankruptcy set forth).

(b) Shugert does not set forth that he is a creditor of the partnership nor that the creditors are less than twelve.

Where a voluntary petition is filed the only averment necessary is that the petitioner is one of the persons entitled to file a voluntary petition and that he is willing to surrender his property to the bankruptcy court for distribution. An averment of insolvency is not even necessary in a voluntary case, for a solvent person may surrender his property to the Bankruptcy Court for the purpose of distribution. Collier on Bankruptcy twelfth edition, Page 141 and cases there cited.

It is quite apparent therefore that the pleader who drew the petition filed by Shugert intended to file a combination voluntary and involuntary petition and we say that there is no authority in law for any such proceedings and the Bankruptcy Court is without jurisdiction to entertain such a petition and is certainly without jurisdiction to issue a subpœna to individuals under such a pleading requiring them to show cause why they should not be adjudged bankrupts individually. The subpœna complained of in this case should have been quashed and the petition as drawn should have been dismissed as to these petitioners.

II.

THE BANKRUPTCY ACT OF 1898 DOES NOT AUTHORIZE ONE PARTNER TO FILE A VOLUNTARY PETITION IN THE PARTNERSHIP NAME WITHOUT THE CONSENT OR ASSENT OF REMAINING PARTNERS BEFORE DISSOLUTION, OR AFTER DISSOLUTION BY OPERATION OF LAW.

The fundamental law relating to partnership in force throughout the United States and the rule in the federal Courts is that, unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to—

(A) Assign the partnership property in trust for creditors on the assignee's promise to pay the debts of the partnership.

(B) Dispose of the good will of the business.

(C) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(D) Confess a judgment.

(E) Submit a partnership claim or liability to arbitration or reference.

The Supreme Court of Pennsylvania many years ago decided in Deckert vs. Filbert, 3 W. & S. 454, that one partner after the dissolution of partnership had no power to make a voluntary assignment of the effects of the partnership for the benefit of creditors without the consent of his co-partners.

The Supreme Court of the United States in Hall vs. Lanning 91 U. S. 160; 23 L. E. 271 decided that,

"After the dissolution of a co-partnership one of the

> partners in a suit brought against the firm has no authority to enter an appearance for the partners who do not reside in the State where the suit is brought and have not been served with process."

Justice Bradley who delivered the opinion of the Court uses this language therein.

> "In the case of Bell vs. Morrison, 1 Peters 351 this court decided upon elaborate examination that after a dissolution of the partnership one partner cannot by his admissions or promises bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgement of a debt. It is well settled by numberless cases that even before dissolution one partner cannot confess judgment or submit to arbitration so as to bind his co-partners. It is equally well settled that after dissolution one partner cannot bind his co-partners by new contract or securities or impose upon them a fresh liability. Appearance to a suit does impose a fresh liability * * * * * * on principle therefore it is difficult to see how after dissolution one partner can claim implied authority to appear for his co-partners in a suit brought against the firm."

We say that it is certainly quite as grave an act upon the part of one partner to file a voluntary petition in bankruptcy in the partnership name without express statutory authority so to do, as it is to enter an appearance or submit a question to arbitration or to confess a judgment. In fact the filing of a voluntary petition in bankruptcy carries with it a confession of judgment because a decree of adjudication immediately follows and settles for all time by a judgment of the court that the partnership is insolvent. To use the language of Justice Bradley it is therefore upon principle difficult to see how after a dissolution of the partnership one partner can plunge the partnership into a voluntary proceeding in bankruptcy in the absence of express authority so to do.

In the matter of voluntary petitions by partnerships the Act of 1898 differs from the Act of 1867 and we contend there is no authority in the Act of 1898 for the proceedings

instituted in the District Court by Shugert.

The Bankruptcy Act of 1867 specifically authorized the filing of a voluntary petition by any one of the partners. The language in that Act being, Section 36.

> "Where two or more persons who are partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them or on the petition of any creditor of the partners, a warrant shall issue, etc."

Since Congress in the Act of 1867 expressly provided that a voluntary bankruptcy proceeding by the partnership might be instituted by any one of the partners and did not in the Act of 1898 incorporate any such provisions, under well known rules for the interpretation of statutes, the presumption is that Congress intentionally omitted this provision, and having omitted it no such power is conferred by the Act of 1898.

There is no reason to assume that Congress omitted the 36th Section of the Act of 1867 from the present Bankrupt Act of 1898 by mistake or oversight. There is obviously a change in the legislative policy; caused by the numerous decisions in the federal courts criticising the unfortunate results arising from the presence of Section 36 in the older Act. It was recognized that the practice under said Section opened an easy door to rapacious and designing persons to oppress and harass their partners; besides in too many instances it made bankruptcy practice intricate and cumbersome by reason of the collateral issues of law and fact thus introduceable.

The maxim borrowed from the Roman law, *expressio unius est exclusio alterius* is so universally accepted as "A well settled legal maxim" and "The well established principle or maxim of law," and "As that universal and familiar rule" and "A rule both of law and equity," and "The well known maxim of construction and a very sound one;" that it would be an affectation to quote any of the multiplicity of authorities whether Federal, State or of the English Courts.

We will limit ourselves to apply this maxim in discussing the inclusion of Clause 36 in the earlier statute and its exclusion or any provision analagous thereto from the present bankrupt act.

"No maxim of the law is of more general and uniform application and it is never more applicable than in the construction and interpretation of statutes;" "The maxim was never more applicable than when applied to the interpretation of a statute that *expressio unius est exclusio alterius.*"

Broom's Legal Maxims, 8th Edition, page 663.

We must bear in mind that the Act of 1898 was not a repeal, amendment or a supplement to the Act of 1867, for that Act had expired by its own limitations; however, much of its provisions were reincorporated in the present legislation, and the rejection of Section 36 emphasizes the reason for applying the maxim above quoted and indeed necessitates its application.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

25 Corpus Juris note "17 (c) page 220.

State vs. Tucson Gas Company, 15 Arizona, 294.

New Haven vs. Whitney, 36 Conn., 374.

Township vs. Dubuque, 7 Iowa, 262.

Scott vs. Ford. 52 Or., 288.

While the Act of 1898 as just above stated has not repealed the earlier Act of Congress, it is in fact a recodification, and its failure to include either Section 36 of the Act of 1867 or any similar provision implies in the strongest manner a negative.

"Possibly the strongest implication of a negative is found where subsequent statutes revise the whole matter of former ones."

Endlich on the Interpretation of Statutes, page 270.

So, Mr. Justice Swayne in delivering the opinion of the Supreme Court of the United States upon the construction of a revenue statute ruled that "The maxim *expressio unius est exclusio alterius* applies with cogent effect. This view is conclusive unless it is overcome by something else found in this statute."

Arthur vs. Cumming, 91 U. S. 362.

As Congress in 1898 refused to enact that "Partners in trade shall be adjudged a bankrupt either on the petition of such partners or any one of them, a warrant shall issue," and the statute under which we are now living entirely omits any proceeding in bankruptcy by one partner against another, how can it be argued that our present legislation on bankruptcy provides for a procedure such as we have at bar, though formerly authorized by a statute now defunct, but expressly excluded from the Act of 1898? All the powers of the bankrupt court, all procedures to be followed therein, are of statutory origin and all its jurisdiction rests exclusively upon the satute of 1898 alone.

Hobbs vs. McLean, 117 U. S. 567.

The Supreme Court in the case of Hobbs vs. McLean 117 U. S. 567; 29 L. E. 940, said upon this question:

> "Where a provision is left out of a statute either by design or by mistake of the legislature, the Courts have no power to supply it. To do so would be to legislate and not to construe."

III.

WHERE IT APPEARS UPON THE FACE OF A BANKRUPTCY PETITION FILED IN THE NAME OF A PARTNERSHIP THAT THE PARTNERSHIP WAS DISSOLVED BY OPERATION OF LAW AND THE PROPERTY OF ONE PARTNER IS BEING ADMINISTERED IN THE PROBATE COURT, THE BANKRUPTCY COURT IS WITHOUT JURISDICTION TO ADMINISTER THE PARTNERSHIP PROPERTY.

Both the original petition and the amended petition filed in this case state that:—

> "Lavinia Catherine Harris (who in her life time was a partner in this business) died on or about the 10th day of January, A. D., 1921, and her estate will be administered by the Orphans' Court of Centre County upon the filing of the account by her executors."

And in the prayer of the petition it is stated that George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, are surviving partners of Lavinia Catherine Harris, deceased.

The Supreme Court of the United States long ago recognized the principle that the Probate Courts of the several States have full and exclusive control over the estates of deceased persons. In the case of Yonley vs. Lavender 88 U. S. 276; 22 L E. 536 the Supreme Court uses this language:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas (the same is true in Pennsylvania) the probate of wills and the grant of letters testamentary and of administration are matters entirely within the jurisdiction of the Probate Court. The legal effect of granting letters testamentary or of administration is to place the whole estate real and personal within the custody of the law and leave it there until the administration has been completed. In this way the assets are preserved that there may be a

> fair and equal division of them among the several creditors according to a scale of priority fixed by law * * * * * * * all demands against deceased persons which are not liens upon specific property before the death of the debtor can only be collected by being brought under the administration of the Probate Court."

The Court then further considers the question in connection with the jurisdiction of the Orphans' Court in the State of Mississippi and cited the case of Williams vs. Benedict, 8 Howard 107. "The jurisdiction of the Orphans' Court had attached to the assets; they were *in gremio legis* and could not be seized by process from another Court."

We contend that the same rule of law prevails in connection with the bankruptcy law and that where one of the partners dies, thereafter the estate of such partner cannot be adjudged a bankrupt, and it necessarily follows that there can be no bankruptcy adjudication against the partnership, one member of which is dead.

Collier on bankruptcy 12th Edition, Page 175.

Collier says that there is a conflict of authority upon the question, but he also recognizes the principle above quoted concerning the jurisdiction of the Probate Court and in discussing this case says:

> "The only difficulty had upon adjudication in such a case is the consequent interference with the administration of the Probate Court of the estate of the deceased partner. In the above absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the Probate Court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than to denial of justice".

The Supreme Court of the United States has apparently not passed upon the question, but there are a number of well considered cases which hold in accordance with the text in Collier just quoted.

In the case of Fackleman 41 A. B. R. 14; 248 Fed. 565, the matter is passed upon by Judge Bledsoe, Southern District of California, and he uses this language:—

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labored under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

The precise question under consideration here was passed upon by Judge Newman in the Northern District of Georgia, in the case of Evans, 20 A. B. R. 406; 161 Fed. 590, in which case he held.

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

This was also the decision of the courts under the bankruptcy act of 1867, the leading cause upon the subject being in re Temple, Fed. Case No. 13825 and reported in 23 Fed. cases at Page 835.

In this case Temple was a member of two partnership firms viz:—Temple & Workman and Temple & Ledyard. He averred that both firms were insolvent and attached his individual schedule and the schedules of both firms. Adjudication followed and Temple as an individual and both partnerships were adjudged bankrupts.

After the petition in bankruptcy was filed and the adjudication made, a creditor filed a bill in equity in the District Court of California in behalf of himself and other creditors, in which it is set forth that both firms were insolvent and that Temple and the firm of Temple & Workman with intent to defeat the operation of the bankrupt laws had made an assignment of all their individual and partnership assets.

Temple likewise made an assignment of the assets of Temple & Ledyard in trust for the satisfaction of creditors. It is further stated that assignees had taken possession of

the property under circumstances which charged them with notice of the fact of insolvency.

The prayer of the bill is that in view of the fact that no assignee in bankruptcy had been appointed that (the assignees) Freeman and Spence might be enjoined from making any disposition or transfer of the assets conveyed to them under the assignment and that they be decreed to hold the same in trust for the assignee in bankruptcy to be elected.

The defendants, Freeman and Spence, the assignees referred to, filed a general demurrer and the Court in passing upon the question said:—

> "It is clear that the action of the register (the bankruptcy officer who made the adjudication under the act of 1867) adjudicating the firm of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard as expressly required by rule 18 of the Supreme Court and Workman was dead at the time the court would commence proceedings. * * * * * The act speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors, notwithstanding a former dissolution *inter sese* where there are joint assets and joint creditors it has never been held that a partnership dissolved by the death of one of the partners can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws. * * * * * The status of a deceased person cannot be passed upon by a bankruptcy court nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partners."

We therefore say to the Court that it appearing from the averments in both the original and amended petitions of John M. Shugert that the said petitioner, Meek, Breeze and Mrs. Dale are surviving partners of Mrs. Lavinia Catherine Harris and that the latter died in January 1921, and her estate is now being administered in the Orphans' Court of Centre County, it necessarily follows that the District Court below is without jurisdiction and the said petitions in bankruptcy should be dismissed.

IV.

SCOPE AND INTERPRETATION OF THE PROVISIONS OF GENERAL ORDER NO. VIII AS APPLIED TO THE CASE AT BAR.

The Circuit Court of Appeals affirmed the order of the District Court apparently upon the authority of Francis vs. McNeal 228, U. S. 695, 57 L. E. 1029 and General Order No. 8 promulgated by the Supreme Court as one of the General Orders regulating proceedings in bankruptcy. Judge Davis in his opinion proceeds to argue that the authority for the decision in Francis vs. McNeal is Section 5 of the bankruptcy act as supplemented by General Order No. 8. In other words Section 5 is invoked to support General Order No. 8 and General Order No. 8 is invoked to authorize the proceedings in this case, and then concludes that the provisions of Section 5 as supplemented by General Order No. 8 is in legal effect equal to the provisions of Section 36 of the Act of 1867 which reads as follows:

> "Where one or more persons who are partners in trade shall be adjudged bankrupts *either* on the petition of such partners *or any one of them* or on the petition of any creditor of any partners a warrant shall issue."

This interpretation of the Act of 1898 requires the court to go outside of the statute itself to find the equivalent of the words used in the Act of 1867, "either on the petition of such partners or any one of them."

We contend that this amounts to judicial legislation and is a forced construction which ought not to prevail. We will attempt to demonstrate that both the District Court and the Circuit Court of Appeals erred in their conclusion in this matter.

Section 5 of the Bankruptcy Act of 1898 provides:

(A) "A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof may be adjudged bankrupt.

(C) The Court of Bankruptcy which has jurisdiction over one of the partners may have jurisdiction over all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides:—

"Any member of a partnership who refuses to join in the petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defences which any debt or proceeded against is entitled to take by the provisions of the act".

General Order No. VIII is practically a repetition of General Order No. XVIII of the act of 1867, which act expressly provided that a subpœna in bankruptcy might issue either on the petition of the partners or *any one of them.* This provision having been omitted from the Act of 1898 we believe that the provisions of General Order No. VIII are broader than the act itself and in so far as its provisions are inconsistent with the Act itself it must abate.

We contend that Section 5 (c) quoted above relates to the venue and is territorial in its application. That is to say that if an involuntary petition in bankruptcy be filed by creditors against the partnership that the court in which the same is filed shall have jurisdiction over all the partners even though some of them live beyond the jurisdiction of the court in which the petition is filed. It certainly is not authority for the proposition that one partner, contrary to the fundamental law governing partnerships, may institute a proceeding that will destroy the partnership. One partner cannot make an assignment of the partnership assets; dispose of the good will of the business; do any act which would make it impossible to carry on the ordinary

business of the partnership, or confess a judgment against the partnership.

The learned court below establishes a basis for its reasoning by an implication that because the Act provides that "a partnership may be adjudged a bankrupt"—that it may be so adjudged by a process not authorized by the Act itself. To our mind this is a reversal of all the rules of statutory construction. There is clearly no intention of enlarging in the language of Section 5 of the Act of 1898 the jurisdictional power of the Federal Courts, or of creating a process other than that explicitly laid down in the act itself, and the learned Judge is driven to re-enforce his reason by calling in General Order No. VIII. It is true that there are some decisions in the lower courts sustaining the position as recited in the said opinion, but a number of rulings by other lower federal courts could be cited to the contrary. None of the questions here involved were before this court in Francis vs. McNeal, 228 U. S. 695, for in the said cited case the petitioner was a creditor in an involuntary proceeding and the resisting partner and respondent was held by this Court to have estopped himself by his own prior acts and agreements as appeared from the record; thus waiving all his status as a non-assenting partner.

Nor can it be fairly argued from the wording of Section 5 (c) that the provisions of the prior Act of 1867, omitted from the Act of 1898 shall be read into it, for that is merely a proper provision to enable one district court, which has already jurisdiction, under the statute, of the partnership and one or more of the partners, to take jurisdiction over all the remaining partners whether they happen to reside within that particular district or not.

V.

THE CIRCUIT COURT OF APPEALS DID NOT GIVE PROPER LEGAL EFFECT TO THE CONDITION RESULTING FROM THE DEATH OF LAVINIA CATHERINE HARRIS.

Still more unsatisfactory is the reasoning in the opinion on the effect of the death of Lavinia Catherine Harris. In fact, this phase of the question is really not discussed or fairly met in said opinion. There is no attempt to meet the objections of the authorities holding to the contrary and no light or suggestion given to regulate the practice.

Thus Judge Newman in the Northern District of Georgia in the case of Evans in Re 20, A. B. R. 406; 161 Fed. 590 held:

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

Judge Bledsoe in the case of Fackleman, 41, A. B. R. 14; 248 Fed. 565 held:

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labor under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

It was also held under the act of 1867 in Re. Temple Fed. cases No. 13825; 23 Fed. cases 835:

> "The act (of 1867) speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors, notwithstanding a former dissolution *inter sese* where there are joint assets and joint creditors, *it has never been* held *that a partnership dissolved* by *the death of one of the partners* can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws * * * * * the status of a deceased person cannot be passed upon by a bankruptcy court nor has he any property the title to which he can vest in an assignee appointed in a proceeding by or against the surviving partner."

The petition in this case sets forth that Lavinia Catherine Harris a former partner is dead and that her estate is in process of settlement in the Probate Court in Centre County, Pennsylvania. Whether her estate is solvent or not can only be determined in the final settlement as adjudicated in the Probate Court. Creditors of the partnership who want to assert claims against this woman's estate in case of a deficiency of partnership proprty will have to assert their claims in the Probate Court *co nomine* and not by any representative of a body of creditors such as a trustee in bankruptcy would be. Collier in Bankruptcy recognizes this defect and points out the lack of authority in the Act of 1898 to adjudge bankrupt a partnership after the death of one of the partners—Pages 242-243 13th Edition, Volume 1, where this author says "the apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate but it leads to confusion rather than denial of justice."

We disagree with the conclusion of the Circuit Court of Appeals in the concluding paragraph of the opinion where this language is used. "After the individual assets of the estate of Lavinia Catherine Harris are administered in the Probate Court if there is a surplus to be applied to the partnership debts it will be turned over to the bankruptcy court."

We contend that creditors of the Centre County Banking Company must individually assert their claims against the estate of Lavinia Catherine Harris in the Probate Court or be forever barred from asserting any claim against her estate. So many of the creditors as do not do this can not participate in any distribution of her estate because that court has exclusive jurisdiction to hear and determine all claims against the estate and if there is any surplus upon final adjudication it goes to the heirs or legatees. A trustee in bankruptcy would have no standing to assert any claim against this estate for he is not a creditor of it. He can only collect debts due the partnership.

The right of a creditor to pursue the individual estate of Lavinia Catherine Harris to recoup any deficiency after the partnership assets are ascertained and distributed is a right purely personal to such creditor which he may exercise or not as he sees fit. The estate of Lavinia Catherine Harris or any part thereof is not an asset of the partnership. Yonley vs. Lavender 88 U. S. 276; 22 L. E. 536; Williams vs. Benedict 8 Howard 107, 12 L. E. 1007.

It would seem from the opinion of his honor Judge Davis, that it would be a very easy thing for the Orphans' Court of Centre County, after discharging the indebtedness against the estate, to relieve itself of all further responsibility by delivering the balance of the estate to a trustee in bankruptcy. But has the learned Judge analyzed his own proposition or is he conscious of the inherent difficulties?

The Probate or Orphans' Court cannot delegate its powers, nor can it so easily shirk its duties and avoid its solemn responsibilities. In it and it alone has the sovereign State of Pennsylvania placed the care and custody of the estates of her dead, and that trust is not ended until the estate is distributed to and among those that are entitled to participate in its distribution. And to the Orphans' Court is alone given both the duty and the power of determining the distributees and fixing the amount of their respective distributions.

Among the many practical reasons not considered by the learned Judge is the primary one that the creditors of the banking partnership may not be, and in the case at bar are not, the same as the creditors of Lavinia Catherine Harris. The record reveals the fact that she died almost a year and a half before these proceedings were instituted. The banking business was continued for at least a year and four months after her death, and day by day new depositors were added thereto and the balances due depositors or creditors were necessarily changing daily. The status of the partnership creditors must be fixed as of the time of the filing of Shugert's petition. The status of the creditors of Lavinia Catherine Harris must be fixed in another jurisdic-

tion as of the time of her death. It thus appears that the future trustee for the Centre County Banking Company will represent much indebtedness and many creditors that were not in existence as such at the time of the death of Lavinia Catherine Harris and to which her estate is not liable. It therefore necessarily follows that the Trustee or Referee or even the Federal Court in Bankruptcy cannot receive nor is entitled in law to receive the remainder of the Lavinia Catherine Harris estate in bulk; nor can any of these usurp the jurisdiction of the Orphans' Court in unraveling this tangled skein.

We might re-enforce our argument by other illustrations of the inherent difficulty in the way of Judge Davis' short cut, but we believe that we have already said enough to convince this Court that the present bankruptcy legislation is no authority for the anomalous procedure presented by the record before it, and that the District Court in Bankruptcy is without jurisdiction to proceed.

VI.

MISJOINDER OF PROCEDURE.

There is certainly in the case at bar a fatal misjoinder of the causes of action. After making every allowance, the practice in the bankruptcy courts should have some method, and bear some analogy to the general rules governing pleadings in other courts.

Neither the Act of Congress nor any authoritative judicial decision authorizes any such drag-net process as we now have under discussion. From no viewpoint can we see any benefit to be derived from a single petition and a procedure arising thereunder, asking for the bankruptcy of different individuals with different estates and different sets of creditors and having nothing in common except that

for some purposes they may be partners. The case at bar is a striking illustration of the undesirability of such a lumping practice.

The petition of John M. Shugert avers that he is insolvent and asks for an adjudication of bankruptcy. So far it is a voluntary petition, clearly authorized by legislation. The record shows no one is opposing it, and yet no action is taken in the matter of his estate, no trustee is appointed, no protection given to his individual creditors, because of questions being raised by his asking in the same petition for an adjudication of bankruptcy against a partnership, of which he is a member. Now, there is no necessary relation between the two estates. Shugert could be personally insolvent while the partnership may not have any indebtedness, or if it has indebtedness the solvent partners might be able to take care of it. Why then should he have not presented at least two petitions, one as to himself, and an entirely separate petition relating to the partnership.

It must be borne in mind that the creditors are different, growing out of different relationships and having a different *status*. There could not be any common meeting for the election of a trustee, because the creditors of the partnership would have no voice in the election of a trustee for John M. Shugert's estate, nor would his individual creditors have any voice in the election of a trustee for the partnership estate.

Bad as this situation was as created originally, it was made much worse by the amendment to the petition asking for a decree of bankruptcy against four living alleged partners. Not a single creditor of any one of these four individuals has joined in this petition or gone upon the record. Not even have any of the partnership creditors joined in the petition. Where is the Referee to draw the line in conducting the proceedings involving so many different estates? The very attempt to combine six different procedures in one leads to confusion and delay instead of simplification. We, therefore, vigorously protest against the allowance of any such practice—the lumping of so many es-

tates with their several issues of fact and law in one common procedure,—and we strongly urge the necessity of vacating the entire procedure *ab initio*.

Respectfully submitted,

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HARRY KELLER,
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Attorneys for Petitioners.

IN THE

Supreme Court of the United States

No. 590 **October Term, 1923**

GEORGE R. MEEK, *Petitioner.*

v.

CENTRE COUNTY BANKING COMPANY, Bankrupt, and GEORGE H. SHUGERT, Administrator of the Estate of John M. Shugert, Bankrupt.

Respondents.

No. 591 **October Term, 1923**

FLORENCE F. DALE, *Petitioner.*

v.

SAME, *Respondents.*

No. 592 **October Term, 1923**

ANDREW BREEZE, *Petitioner.*

v.

SAME, *Respondents.*

Certiorari to Circuit Court of Appeals for Third District.

Supplemental Brief on Behalf of Petitioners as to Continuance of Proceedings

Counter Statement of Questions Involved

First. Do proceedings in involuntary bankruptcy abate by reason of the death of the petitioner before adjudication, so far as the partnership as an entity and the non-consenting partners are concerned?

Second. Are the proceedings fatally defective because of the misjoinder in the petitioner's petition for his voluntary bankruptcy with the demand for the involuntary bankruptcy of the alleged non-assenting partners as well as the partnership?

Third. Whether or not the petition as an involuntary petition in bankruptcy is fatally defective because it fails to aver generally or specifically an act of bankruptcy?

Fourth. Whether or not the petition asking for an adjudication of an involuntary bankruptcy against the partnership and non-assenting partners is fatally defective because it fails to aver that the petitioner is a creditor of the same?

Fifth. Whether or not the Federal Court in Bankruptcy has jurisdiction where the petitioner sets forth the recent death of one of the partners and the further fact that her estate is being settled in the Orphans' Court having jurisdiction therein?

BRIEF

The record now in this Court reveals the fact that each of the three appellants, George R. Meek, Florence F. Dale and Andrew Breeze deny that they are members of the partnership doing business under the name of the "Centre County Banking Company," and the opinion of said Court heretofore filed in this case April 7, 1924, notes the denial of partnership by two of these appellants.

We concede, however, that in the present argument their status must be accepted as non-consenting partners. But we insist that the questions on their behalf, both jurisdictional and the legal effect of John M. Shugert's death, must be determined solely from the record.

Therefore, we seriously object to the effort of counsel for the intervening administrator, one of whom represented the original petitioner, to interject into their argument statements of fact which are not a part of the record and before the Supreme Court of the United States, and we particularly object to the statement in their last brief which is as follows:

> "Consideration may also be given to the fact that Mary C. Harris, a co-partner, whose individual assets are considerably larger than those of any other member of the firm, and who has filed a schedule in the bankruptcy court of her assets and liabilities, has filed no protest. It will probably not be disputed that the net value of her estate is more than twice that of the combined estates of the three appellants."

Upon this statement of fact is predicated one of the questions which opposing counsel say is involved in this case.

What Mary C. Harris has done or may do has nothing to do with this case or at least the issues now before this Court; nor can she in any way abridge or minimize the legal rights of these three alleged partners, much less can she confer a jurisdiction on the courts other than that already vested in them by the law. Therefore, the amount of her estate is wholly irrelevant and immaterial. While we fully realize that this Court will pass judgment only upon what is contained in the record now before it, we feel it to be our duty to call to your attention that the record does not disclose the actions of Mary C. Harris, the value of her estate or the value of the estates of the three appellants.

I

The first argument of the learned counsel for the intervening administrator is in direct variance with the decision of this Court in this very case, for in the opinion of Mr. Justice Sanford, filed April 7th, 1924, is found the following definite determination:

> "It is clear, however, that whatever may be the effect of this provision (Sec. 8, Bankruptcy Act of 1898) when construed in the light of Sec. 1 a. defining the term "bankrupt" it can have no application except to that part of the petition in bankruptcy in which Shugert sought to have himself adjudicated a voluntary bankrupt—a matter not in issue under the motions to dismiss and not now before us."

Therefore, a composite question is still before the Court

which is roughly divisible into two parts. First, whether or not under the state of the record, John M. Shugert, if still living could maintain his petition; and secondly, the effect of his death before final adjudication.

II

We have in the several briefs, heretofore filed in this case, discussed quite fully the questions that were raised for determination by us while Mr. Shugert was still living, and we will therefore briefly, for the convenience of the Court, consider them as follows:

(a) Could John M. Shugert by a single combination petition pray for a voluntary adjudication of bankruptcy as to himself individually, of the Centre County Banking Company an alleged partnership of which he claimed to be a partner, and of three individuals, namely, the appellants, and admittedly not consenting to the procedure?

(b) Can Shugert maintain a petition that is involuntary as to the partnership and his alleged partners without an averment that he was a creditor and represented the required statutory indebtedness?

(c) Could he maintain his petition as an involuntary proceeding in which he averred no acts of bankruptcy, either on the part of the alleged partnership or of his alleged non-consenting partners?

(d) Can his petition be maintained where he averred the death of one partner that raised a presumption of law as to the dissolution of the partnership?

(e) Can a petition in bankruptcy be maintained that avers the death of a partner and the further fact that the deceased partner's estate was in the course of settlement in the Orphans' Court of Centre County, a court of competent and exclusive jurisdiction?

A. In the opinion filed April the 7th, 1924 this Court has already determined that Shugert's petition was an involuntary one as to the three appellants and necessarily involuntary against the partnership because the record discloses that the three appellants as alleged partners were non-consenting.

It seems to us that the combination of a voluntary and involuntary proceeding in bankruptcy arising from a single petition is unthinkable and necessarily leads to complications in practice that make such combination impracticable, if not fatal. We concede that if Shugert as a partner was authorized by his fellow partners to ask voluntarily on behalf of the whole partnership and as the agent of each of the partners that the difficulties might be minimized, though not completely removed, for in the election of a trustee there would be a clash of interests between the creditors of the partnership and the creditors of the individual partners. Who could determine in such a proceeding whether there should be one trustee for all the several estates or separate elections by the several classes of creditors of trustees in each separate estate. Such an involved situation ought not to be tolerated unless authorized by law. We, therefore, urge that this petition be adjudicated a fatal misjoinder.

B. In further discussion of the decedent's petition, in view of the determination of this Court quoted *supra*, we shall assume that the said petition so far as it pertains to the three appellants and the alleged partnership to be involuntary. From this angle it is fatally defective, for it is not instituted by the required number of creditors or for the alleged amount of indebtedness required by the statute; and these statutory requirements are jurisdictional and their absence fatal. How much more so when the petitioner does not aver that he is a creditor in any amount? It necessarily follows that the whole of the petition outside of that pertaining to his own voluntary bankruptcy is surplusage and as such falls from the discussion. This Court already concedes that there is no express grant of power by the Act of Congress in John M. Shugert to maintain his petition except upon express statutory grounds, and that his petition fails to set forth any of those grounds. Counsel for the intervening administrator in reality is urging the Court to legislate, by arguing that you as a Court of equity sitting in bankruptcy may sustain petitions brought by persons other than those named in the Act of Congress and without the required averments. We cannot conceive that this Court will do this, and thus invade the province of the legislative branch of the government especially when we realize that the Congressional legislation is itself in derogation of the common law rights of American citizens.

(C) This Court has already noted the absence of any allegation of bankruptcy in the decedent's petition. Hitherto all courts have agreed that in involuntary bankruptcy an averment of an act of bankruptcy is indispensible and without it jurisdiction is not vested in the bankrupt court.

The Act of Congress requires it as a condition precedent to jurisdiction. This seems to be the settled construction in our courts. Even a general averment of bankruptcy has been held to be insufficient and not curable by amendment unless made at least within four months of the date of the alleged act of bankruptcy. Under the canons of statutory construction that normally control the courts such a definitely required averment precludes the courts from recognizing a petition that neglects to comply with the Act. For this Court to concede the argument of counsel for the administrator would again amount to judicial legislation and will surely not be favored.

(D and E) In our first brief filed in this Court we discussed quite fully the effect of the averment in the petition, that one of the partners had died and that her estate was being settled in the Orphans' Court of Centre County. On any theory a court of competent jurisdiction has exclusive control over the assets of one partner and the exclusive *distribution* of said assets as well. There has been no settled procedure to meet such an exigency; there is no recognition or provision in the congressional legislation for such an exigency, nor has there been established any such procedure by judicial decree or interpretation. The more such a situation is analyzed the greater the difficulties become, and the thoughtful mind can well approve the dictum in "Collier on Bankruptcy," wherein he concludes that the jurisdiction of the Federal Courts in bankruptcy as to such a partnership is extremely doubtful and should be expressly vested in them by legislation.

Thus far our argument upon the several jurisdictional questions, just briefly touched upon, is a *resume* of our earlier brief. Since then however our reasoning has been immensely strengthened *if not made unanswerable,* by your ruling of April 7th, 1924, in this case. Mr. Justice Sanford very clearly defines the relative status of Shugert, the petitioner, with his alleged partners, the appellants, and the partnership itself, precisely as contended for by the appellants from the beginning of this controversy. We can not better express our thought as to the true relationship between the several parties, than by quoting the exact language of the learned Justice:

> "In other words, in so far as Shugert's petition sought not merely to have the partnership adjudged bankrupt as against the defendants, but also to have them adjudged as individuals, it was clearly an antagonistic proceeding. To that extent Shugert was not the "bankrupt" but stood in a position analogous to that of a creditor seeking the involuntary adjudication of his debtor. Even in so far as the petition sought to have the partnership adjudged bankrupt, the defendants, as non-consenting partners, were entitled, under the specific provision of General Order No. 8, to make defense "in the same manner as if the petition had been filed by a creditor of the partnership." Note 3, *supra.* And, a *fortiori,* they were entitled to make such defense to so much of the petition as sought their bankruptcy as individuals."

If Shugert stood in a position "analogous to that of a creditor seeking the involuntary adjudication of his debtor," it follows irresistibly that his petition must meet the statutory requirements imposed by Congress on Creditors' petitions. What good purpose would be served by exempting the dead petitioner from the need of averring the necessary jurisdictional facts? And if this High Court should

make a special exception in this case, where would such a precedent lead the profession?

It follows, if anything still more irresistibly, that if the non-consenting partners "may make defense in the same manner as if the petition had been filed by a creditor," they have the right to raise as against Shugert's petition the several questions of jurisdiction, that they stand upon. And these would prove fatal to any creditors' petition, and logically, therefore, to the Shugert petition. Or, conversely, Shugert's petition must contain the jurisdictional averments, the absence of which would be fatal in a creditors' petition, because the non-consenting creditors, as has been thus determined, may set up any defense to his petition that they could to a creditor's petition; and any defense necessarily includes the absence of jurisdictional averments.

III

We have already expressed in a former brief filed in the case our reasons why the whole proceedings should abate by reason of the petitioner's death, and we cannot now see on a later reconsideration that any substantial reason has been advanced why it should not abate. Conceding, as Mr. Justice Sanford has remarked, that it is one of "first impression," nevertheless our motion is based upon the same principles that have been applied to analogous cases. The Common law principle originally was that death did abate in every instance and each exception thereto has been created by statute. This Court, as we have argued heretofore, has noted this line of adjudication and has approved the principle that where the procedure is under an Act of

Congress and not regular otherwise the death of the actor will cause abatement unless otherwise provided in the Act itself. It is conceded that the Act of Congress of 1898 generally known as the present Bankrupt Act does not provide an exception to abatement in such procedure as this, except in the case of the "bankrupt," and it is further conceded and actually ruled by this Court that Shugert was not in the statutory definition the "bankrupt" so far as the procedure is between Shugert and the non-consenting partners and the partnership. He is a petitioner only. So far as the record discloses his petition represents himself individually and exclusive of every other interest, and his interest died with himself. There is no one to inherit it. It certainly was not assignable in his lifetime, nor when we consider the state of the record does the law impose upon the decedent's representative the duty and necessity of continuing the litigation. Especially is this so when the petition was not prepared by him on the theory that he was a creditor, but only as a partner.

For each and all of the above reasons we confidently urge that this entire proceeding be dismissed or abated.

Respectfully submitted,

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Williamsport, Pa.
ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.

Attorneys for George R. Meek, Florence F. Dale and Andrew Breese Petitioners.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 590191 October Term, 1923.

GEORGE R. MEEK,

Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,

Respondents.

Answer of Respondent and Brief to Petition of George R. Meek for Writ of Certiorari.

S. D. GETTIG,
BELLEFONTE, PA.,
Attorney for Respondent.

N. B. SPANGLER,
BELLEFONTE, PA.,
Attorney for Creditors' Committee.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

No._____.

George R. Meek,
Petitioner,
AGAINST
Centre County Banking Company, a partnership, and John M. Shugert, individually,
Respondents.

Answer of Respondent to Petition For Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:—

The answer of JOHN M. SHUGERT, respondent, to the petition for a writ of certiorari in the above stated case, respectfully shows:—

I. Respondent admits the facts set forth in paragraph one of said petition, but denies that the same is an involuntary proceeding under the Bankruptcy Act of 1898.

II. Respondent admits that the petitioner moved to dismiss the proceedings in bankruptcy, for the reasons set forth in paragraph two of the petition, and for further

answer to said paragraph and sub-sections A, B, C, D, E, and F thereof, states as follows:

A. That the District Court has jurisdiction to allow or determine the petition in bankruptcy filed by the said John M. Shugert.

B. Respondent admits these facts, but avers that the petition filed by the said Shugert is not an involuntary petition under the Bankruptcy Act.

C. Respondent admits that the original petition filed by the said Shugert was a voluntary one, and avers that the amended petition was of like character.

D. Respondent denies these allegations and avers that neither the original nor amended petition showed that the partnership was dissolved and that the entire proceeding has been as to the jurisdiction of the Court, and that no evidence has been heard by the District Court to determine whether or not there was a dissolution of the partnership. Respondent further avers that even though there was a dissolution, the District Court has jurisdiction, if, upon taking of testimony, the evidence shows that the partnership debts remain unpaid and that the partnership and individual members are insolvent.

E. Respondent denies as a matter of law the allegations in said sub-section set forth.

F. The allegations in this sub-section are denied.

III. Respondent admits the facts set forth in paragraph three of said petition.

IV. Respondent admits the facts set forth in paragraph four of said petition, but avers that George R. Meek filed an answer, not only to the questions of law, but questions of fact to the original petition filed by the said Shugert in the Bankruptcy Court.

V. Respondent admits the facts set forth in sub-section A of paragraph five of said petition.

Respondent admits the facts set forth in sub-section E. of paragraph five of said petition, except that no where has the District Court or the Circuit Court decided that the filing of the petition by John M. Shugert on behalf of himself, the said partnership and his co–partners, was an involuntary petition under the meaning of the Bankruptcy Act, but that the same was such a petition as said Act authorized a co-partner to file on behalf of himself, the partnership and its members.

Respondent denies sub-section C of paragraph five of said petition, as no such statement, as therein contained, was made in the order of the District Court or in the opinion, and decree of the Circuit Court, and further avers that the petition in bankruptcy filed in the District Court by the said John M. Shugert does not state that there has been any dissolution of the said partnership, by reason of the death of Lavina Catharine Harris, a member of the same, and no testimony has yet been taken before the District Court to determine whether under the written agreement of co-partnership a dissolution was caused by her death. Respondent further avers that under sub-section A of Section five of the Bankruptcy Act of 1898, there being no final settlement of the said co-partnership, the members thereof may be adjudged bankrupts before or after the dissolution of the partnership, and that whether the same occurred is not material in this proceeding.

Respondent admits the facts set forth in sub-section D of paragraph five of said petition, except that the Bankruptcy Act of 1867 did not expressly provide that one partner might file a petition to have the partnership adjudged a bankrupt, nevertheless the appellate courts held that the Bankruptcy Court did have such authority under said Act.

VI. Respondent avers that the facts set forth in paragraph six of said petition are not true, so far as the cases therein cited and relied upon by petitioner are concerned, as the same are not applicable to the facts in this case, but avers that said paragraph, so far as the same relates to the authorities of the Circuit Court of Appeals is concerned, are true and correct.

VII. In answer to paragraph seven of said petition, respondent avers that the questions therein raised for consideration are not such as will ordinarily be considered by this Court on petition for certiorari, for the reason that the same questions can be raised later by the petitioner when declared a bankrupt, and it is unusual to allow a writ of certiorari on an interlocutory order, where the same question may be raised thereafter in the same proceeding.

VIII. In answer to the eighth paragraph of said petition, respondent avers that the jurisdiction of the District Court to declare the petitioner and his co–partners, bankrupts, as contained in the record in this case, has been ruled by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695, 57 L. Ed. 1029, and followed by the Circuit Court of Appeals in this case, and that the allowance of the writ of ceriorari would, therefore, avail the petitioner nothing, but would only cause delay, resulting in great hardship to approximately 1200 creditors, many of whom are in destitute circumstances and in need of whatever pro rata they may obtain in a final settlement of the partnership affairs.

WHEREFORE, your respondent prays this Honorable Court that the writ prayed for by the petitioner be denied, and said petition dismissed, with costs.

JOHN M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY IN CENTRE. } SS:

JOHN M. SHUGERT being duly sworn deposes and says: I am the respondent, hereinabove named. I reside in the Borough of Bellefonte, County of Centre and State of Pennsylvania. Each and every allegation in the foregoing answer is true to my own knowledge, except as to the matters herein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Sworn and subscribed before me this 2[illegible] day of October, A. D., 1923.

ELIZABETH C. WALKER
NOTARY PUBLIC
My Com. Expires March 6, 1925.
[Seal]

JOHN M. SHUGERT

BRIEF

RECORD AND PROCEEDINGS IN DISTRICT COURT, AND ORDERS MADE IN PURSUANCE OF SAME. ALLOWANCE OF WRITS OF CERTIORARI.

The Centre County Banking Company, a co-partnership, closed its doors and ceased business, May 13, 1922, because of insolvency, and John M. Shugert, one of the partners of said firm, on June 30, 1922 (Record pages 1, 8, 9 and 10) filed a petition in bankruptcy, on behalf of himself and said firm, in the District Court for the Middle District of Pennsylvania, wherein said firm was engaged in a general banking business.

Subpoenaes were awarded and served, except as to Andrew Breeze, who then resided out of said District, George R. Meek and Florence F. Dale, two of the petitioners, filed answers thereto, raising questions of fact, namely, denying that they were partners, (Record, pages 14, 15, 16 and 17). On these answers appear also the names of their counsel, although the record does not show it, without designating whether the appearance is general or special. An amended petition was filed in said Court by the said Shugert August 26, 1922 (Record, page 56) and after notice and argument by counsel representing all the parties, the same was allowed by the District Court September 15, 1922 (Record, page 54), and in pursuance thereof, subpoenas were awarded and served personally as to all parties, except Andrew Breeze, upon whom constructive service was had by publication.

The case was docketed in the District Court, not as set forth by petitioner in this court, and by respondent so as

to conform therewith, but as follows, (Record page 1):

"In the matter of
"John M. Shugert, Lavina Catherine Harris, deceased,
"George R. Meek, Mary C. Harris, Florence F. Dale,
"and Andrew Breeze, individually and trading as
"Centre County Banking Company,
"Bankrupt."

No testimony has been taken before the District Court to determine the solvency or insolvency of said partnership and the individual members thereof, nor is the written agreement under which said firm did business in evidence.

In the case of Denver v. New York Trust Co., 229 U. S. 1101; 57 L Ed. 132-134, it was stated by this Court in its opinion that "the exceptional power to review, upon certiorari, a decision of the Circuit Court of Appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised."

It is unusual that the questions raised by the petitioners should be heard by this court at this stage of the bankruptcy proceedings. No adjudication in bankruptcy has been made by the District Court.

In the case of in re Oregon Bulletin Printing etc. Co., 3 Sawy. 5229; 18 Fed. Cas. No. 10,560, the Circuit Court of Appeals said:

"No case has been found where a petition for review has been acted on before a final judgment upon the petition in bankruptcy."

It has been held in a number of cases, that, where an interlocutory decision may be reviewed on appeal from a final decree, a petition to revise will rarely be granted.

In re Chotiner, 218 Fed. 813.

In re Horowitz, 250 Fed. 106.

II.

AUTHORITY OF ONE PARTNER TO BRING INTO THE BANKRUPTCY COURT THE PARTNERSHIP AND ITS MEMBERS ON A PETITION FILED BY HIM, WITHOUT THE CONSENT OF THE OTHERS.

The learned Counsel for the petitioners has attempted to place a strict and narrow construction upon the Bankruptcy Act of 1898, whereas the converse of this proposition has been followed by the bankrupt courts.

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In the proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

We deem it unnecessary to cite any authorities to show that the act must be given a liberal construction.

It is conceded by counsel for petitioners that under Section 36 of the Bankruptcy Act of 1867, a partner could bring into the bankruptcy court his non-consenting part-

ners, on the ground that said section expressly provides that he may. It contains no such mandatory provision. Section 36 of said Act is as follows:

> "Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, etc."

This section, as stated by Judge Lowell, is re Carleton 115 Fed. 247:

> "Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided *what should happen* after all had been adjudged bankrupt upon the petition of one partner or of a creditor."

Respondents contend, that the provisions of Section 5 of the Bankruptcy Act of 1898 are much broader than those of Section 36 of the Act of 1867, relating to partnerships. Paragraph (a) of section 5 of the Act 1898 reads as follows:

> "A partnership during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

This includes all kinds of partnerships, except as provided by section 4, and not merely those "in trade" as provided by the Act of 1867. That it was the intention of Congress to thus broaden the scope of the bankruptcy courts and simplify the practice is apparent from the privisions of paragraph (c) of Section 5 of the Act of 1898, which is as follows:

> "The Court of Bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all the partners, and of the administration of the partnership and individual property."

It is plain that one partner may bring into the bank-

ruptcy court, all of the partners, and that its property and that of its members is subject to the jurisdiction of said Court for the purpose of liquidation. There has been diversity of opinion as to whether a partnership as an entity may be adjudicated a bankrupt; and where a partner files a petition in bankruptcy in behalf of himself, the copartnership and its individual members, it has been held in some jurisdictions, that while the property of the individual partners, as well as that of the firm, was subject to the jurisdiction of the bankruptcy Court, that the non-consenting partners could not be adjudicated bankrupts. These questions, under more recent decisions, have been practically settled by the Federal Courts. The better practice, and which is not prohibited by statute, is to adjudicate bankrupt the non-consenting partners, as well as the petitioner.

> "Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury." In Re Forbes, 128 Fed. 137.

As to the practice in proceedings such as the case at bar, we quote the following from the opinion of Judge Lowell in the case above cited:

> "But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as In re Dunnigan (D. C.) 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estate of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy.

Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all it partners. See Vaccaro V. Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Blair (D. C.) 99 Fed. 76; Davis V. Stevens (D. C) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceeding is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actu-

ally committed by all the partners. Even their privity is not essential. 'An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases.' Lowell on Bankruptcy, 43. A voluntary petition is itself treated as an act of bankruptcy. In re Fowler, I Lowell, 161, Fed. Cas. No. 4, 998; Lowell on Bankruptcy, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See In re Murray (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the

firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

Section 5 of the Bankruptcy Act of 1898, has been construed by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. That case originated by adverse proceeding upon petition of creditors. It has nevertheless established "uniformity of decision", if any were necessary, in cases like the present. The commendation therein of the opinion of Judge Lowell by this Court, in a case similar to the present, and hereinabove quoted, should be a sufficient answer to all of the questions of law raised by the petitioners.

We, therefore, quote in full the opinion of this Court in Francis v. McNeal as follows:

"Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is,

so far as may be, to preserve, not to upset, existing relations. It is true that by Section I, the word 'person,' as used in the act, includes partnership; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from Section 5, clauses c, through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt'. (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.)

"In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

"On the other hand ,it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private

debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, is an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no objection has been taken but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority of Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct."

In the case of re Samuels, 215 Fed. 845, where an attempt was made to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent, the Circuit Court of Appeals, Second Circuit, quoted from Judge Lowell in the Forbes case, and said, inter alia, as follows:

"We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insol-

vent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra."

Again in the case of Yungbluth v. Slipper et al, 185 Fed. 773, where it was held that a voluntary assignment of all the property and assets of a firm operating a private bank, to a receiver, though done by one partner and not participated in by the other, the Circuit Court of Appeals, Ninth Circuit, approved of the opinion of Judge Lowell, in re Forbes, and in referring to his opinion, on page 775 said:

> "The true construction of this feature of the bankruptcy law is, we think, best expressed by Judge Lowell, In re Forbes (D. C.) 128 Fed. 137, a case in which, in view of section 5 of the act (Act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. St. 1901, p. 3424), which provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt, he held that the partnership may not be made bankrupt except by an adjudication of all its partners, *and that the only defense a nonconsenting partner can make to the petition is that the partners are able to pay the partnership debts and their own debts, out of the joint or separate estates.*"

In the case of re Carleton, 115 Fed. 246, in which a petition was filed by one member of a partnership, for the purpose of bringing into the bankruptcy court the partnership and his co-partner, the opinion cites authorities to show that neither under the bankruptcy acts of 1841 nor 1867, was it

necessary for one partner to bring the partnership and its individual members into Court, to allege any acts of bankruptcy, other than insolvency of the firm and its individual members. In the opinion on pages 247 and 248, it is stated with reference to the Sections relating to partnerships under these Acts and that of 1898, as follows:

"The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

"Section 14 of the act of 1841 provided:

> "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are here exempted. 5 Stat. 448.'

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

> 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the

partners, shall be taken, exceptiong such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

> " 'In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. *No.* 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214, In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re

Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 455 Fed. Cas. No. 17,784. * *

"Section 5 of the act of 1898 provides that 'a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867."

It has been almost a universal practice of the bankruptcy courts, where the partnership and one or more, but not all the members of the firm, were adjudicated bankrupt, that the individual property of those not declared bankrupt, was subject to the jurisdiction of the bankruptcy court in the settlement of the partnership indebtedness, and this was held to be the law of the Circuit Court of Appeals, Eight Circuit, even where, on demurer, the petition in bankruptcy was dismissed as to the non-consenting partner. Armstrong vs. Fisher, 224 Fed. 97.

The rule that the individual property of a partner not adjudicated a bankrupt, shall be administered in the federal courts, the same as a partner, which has been adjudicated, is unfortunate, and is to be avoided wherever the same may be lawfully done. Not having been adjudicated a bankrupt,

such partner may not receive a discharge, as provided by section 14 of the said Act. As was said by this Court in Francis vs. MeNeal.

"On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full."

It is apparent that the conflict of decisions under section 5 of the Act of 1898 arose, not from the right of the bankrupt court to administer the individual property of the non–consenting partner, but whether the latter might be declared a bankrupt on a petition alleging only insolvency of the firm and its members.

The weight of authority and the practice as now generally adopted is to adjudicate all partners bankrupts.

III.

GENERAL ORDER VIII.

Counsel for petitioners contend in effect that because the Act of 1867 provided for the issuing of a subpoena (warrant) and that no such provision is made in the Act of 1898, that this Court has exceeded its authority in adopting General Order VIII.

There is nothing in General Order VIII, defining the practice, which violates the Bankrupt Act of 1898, and read in connection with section 14, it is more logical, and the better practice, that the non-consenting partners should likewise be adjudicated bankrupts.

Section 30 of the Bankruptcy Act of 1898, expressly provides that "All necessary rules, forms, and orders *as to*

procedure and for carrying this Act into force and effect, shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." This General Order defines only the methods of procedure as to the non-consenting partner where the bankruptcy court has acquired jurisdiction of one partner as provided by paragraph C of Section 5 of said Act.

If additional authority were needed, it could be found in the Act of Congress of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. at L. 81) Rev. Stat. 716, which empowers this Court, and the Circuit and District Courts of the United States "to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usuages and principles of law."

> "The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law."
>
> In re Gerber, 186 Fed. 694.
>
> Sabin v. Blake-McFall Co., 223 Fed. 505.
>
> In re Langford, Felts & Myers, 225 Fed. 314.
>
> In re Hoyt & Mitchell, 127 Fed. 969.

IV.

JURISDICTION OF BANKRUPTCY COURT WHERE ONE MEMBER OF PARTNERSHIP DIES PRIOR TO THE FILING OF THE PETITION.

The petition in bankruptcy (Record 56) set forth:

> "That your petitioner and George R. Meek, Florence F. Dale and Andrew Breeze, who survive Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, etc."

The petition alleges no dissolution of the partnership, either by the death of Lavina Catherine Harris, or otherwise, and there is no presumption of such dissolution, by a

mere statement in the petition that she is dead and that her estate is being administered by the Orphans' Court. But even though a dissolution had occurred, which is not a fact, by reason of her death; under paragraph (a) of Section 5 of the Act of 1898, the surviving members, where no final settlement has been made, may be adjudged bankrupt, not by separate petitions, but as members of the partnership, which is brought in with them. This construction is more apparent since the decision of this Court in the McNeal case, as to the entity doctrine of partnerships.

The petition (Record 57) also sets forth:

> "That there has been no final settlement of the partnership business of said parties, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than one thousand dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

In re Meyer, 98 Fed. 976, the partnership consisted of Charles H. Meyer; Henry L. Meyer and Joseph R. Dickinson. Charles H. Meyer died prior to the presentation of a petition to the District Court to declare said partnership and its members bankrupts. The District Court declared the partnership and Henry L. Meyer, individually, bankrupts, which adjudication was affirmed by the Circuit Court Court of Appeals, Second Circuit.

In the case of Vaccaro et al vs. Security Bank of Memphis, et al 103 Fed. 432, the Circuit Court of Appeals, Sixth District, where a partnership was composed of three brothers, A. Vaccaro, one of them having died prior to proceedings in bankruptcy against the partnership, said Court referring to the case of Re Meyer, stated:

> "Again, the act declares that the Court, having jurisdiction of one of the partners, may have jurisdic-

tion of all, 'and of the administration of partnership and individual property.' In re Meyer, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency law of 1838, as interpreted by the Massachusetts decisions. Philip v. Parker, 2 Cush. 175; Thompson vs. Thompson, 4 Cush. 127; Dearborn v. Keith, 5 Cush. 224; Hanson v. Paige, 3 Gray 239."

In re L. Stein and Company, 127 Fed. 547, the Circuit Court of Appeals, 7th Circuit, where one of the partners was insane, stated, inter alia, as follows:

"We perceive no valid reason why this manifest purpose of the bankruptcy act should not have full effect. In the case of a decedent the proper probate court assumes the charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the partnership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after payment of partnership debts. So, also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the copartnership debt, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—than an insane person may not be adjudicated a bankrupt (upon which question see In re Pratt, 6 Nat. Bankr. Rep. 276, Fed. Cas. No. 11,369; In re Weitzel, 7 Biss. 289, Fed. Cas.

No. 17,365), nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject partnership property to the payment of partnership debts and for an adjudication of bankruptcy against the sane partner. The argument in the cases cited is so complete and satisfactory that the subject needs no further discussion."

V.

DISSOLUTION OF PARTNERSHIP.

Even though a dissolution had occurred by reason of the death of Lavina Catherine Harris, which is not a fact, where there is no final settlement, as provided by paragraph (a), Section 5 of the Act of 1898, the bankrupt Court has jurisdiction over the partnership and its surviving members.

"Under Bankr. Act July 1, 1898, c. 541, Section 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership after its dissolution by the death of one partner may be adjudged a bankrupt, and in such a case the proceedings are not invalidated by the fact that the petition did not refer to the deceased partner nor disclose that the partners named were surviving partners, where the business was being continued as provided in the partnership articles."
In re Coe et al, 157 Fed. 308.

To the same effect is the case of In re Pinson & Co., 180 Fed. 787, where the Court said:

"The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are

unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

Although there may be a dissolution of the partnership, where assets or debts of a partnership remain, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

Holmes v. Hamilton, et al, 160 Fed. 922

In the case last cited, on the question of dissolution, Gilbert, Circuit Judge, stated, inter alia, as follows:

"GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution crditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed his connection months prior thereto, and it is argued that at the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In re Crockett et al., 2 Ben. 514, Fed. Cas. No. 3, 402; In re Foster, 3 Ben.

386, Fed. Cas. No. 4,962; In re Noonan, 3 Biss. 491, Fed. Cas. No. 10,292; In re Stowers et al, I Lowell, 528, Fed. Cas. No. 13,516; In re Hirsch et al (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In re L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272."

In the case of Fackleman, 248 Fed. 565, cited by counsel for petitioners, Pomeroy &Fackleman were partners in the grocery business in California; Fackleman sold out to Pomeroy, who continued the business in his own name until the time of his death. Fackleman had moved to Nebraska. Subsequently to the death of Pomeroy, a proceeding in bankruptcy was instituted in the District Court of California, against Fackleman, as surviving partner of Pomeroy & Fackleman, and against the latter individually. By reason of the non-residence of Fackleman, and that the firm had been out of existence for a number of years, the court had no jurisdiction.

Neither does the case of in re Evans, 161 Fed. 599, cited by counsel for petitioners, apply. There the partnership consisted of two persons. One member was dead. The other member continued the business for a number of years, and then filed a voluntary petition that he was the sole owner of the business conducted by him after the death of his partner, under the name of Evans & Co. Creditors then intervened to bring in other parties as members. No attempt was made to hold the estate of the deceased partner.

The argument of the learned counsel for petitioners that, where the surviving members are adjudicated bankrupt, there is a consequent interference with the administration of the Probate Court, of the estate of the deceased partner, is illogical. Would there be less interference if a proceeding had been instituted in the local Court by John M. Shugert, under our insolvent laws or by bill in equity? In either case, the jurisdiction as to the surviving partners, would be in the Common Pleas Court. The creditors of the partnership would still be subject to a divided jurisdiction, with no better advantage than under the present proceeding. Such a proceeding would not oust the jurisdiction of the Orphans' Court in the settlement of the estate of the deceased partner.

The case of Temple & Workmen, and Temple & Ledyard, cited by counsel for petitioners, does not apply. That case arose under the Bankruptcy Act of 1867, Section 36, relating to partnerships, made no provision for an adjudication of bankruptcy "after its dissolution and before the final settlement" as provided by Section 5 of the Act of 1898.

The Bankruptcy Court undoubtedly has acquired jurisdiction of one of the partners, namely, John M. Shugert, and may, therefore, as provided by clause (c) of Section 5 of the Act, have jurisdiction of the others. The authorities show that it was never intended by Congress in passing the act of 1898, that a petitioning partner should be required to allege any other act of bankruptcy than insolvency as against the non-consenting partners. To be compelled to do so, would defeat the very purpose of the act. Undoubtedly, there are many instances where none of the acts of bankruptcy defined in Section 3 have been committed by any member of a partnership, except that of insolvency. If thereby one member could not bring into court the partnership and its non-consenting members, such petitioner

could not be relieved by an individual voluntary petition, of his partnership liability. He might not be insolvent, so far as his individual debts are concerned. He would thus be deprived of the very purposes for which the act was passed, and would be excluded from the express provisions of Section 4 which defines who may or may not become bankrupts.

All the questions of law raised by the petitioners were decided by the Circuit Court in a very lucid opinion by Judge Davis. As a summary of all the questions involved, we quote his opinion, at length, which is as follows:

DAVIS, Circuit Judge. All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoena on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and, second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the

partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5 a and c, of the Act of 1898 provides that:

> (a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by those rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not voluntary petitions in Bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a vol-

In conclusion respondent contends that the Circuit Court made no error in sustaining the order of the District Court. That there is no such diversity of opinion by the District and Circuit Courts on the questions of law raised, as would move this Court to grant the writs of certiorari for the mere purpose of establishing "uniformity of decision" in matters of practice under the bankruptcy Act, and especially in view of the hardship imposed upon many destitute persons, who are creditors of the Centre County Banking Company, and who have awaited patiently the termination of this litigation, and who are in dire need of whatever they may be able to obtain on a final settlement.

We, therefore, submit that the writs of certiorari should be denied, with costs to petitioners.

Respectfully submitted,

S. D. GETTIG,
Attorney for Respondent.

N. B. SPANGLER,
Attorney for Creditors' Committee.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 591 19

October Term, 1923.

FLORENCE F. DALE,

Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,

Respondents.

Answer of Respondent and Brief to Petition of Florence F. Dale for Writ of Certiorari.

S. D. GETTIG,
BELLEFONTE, PA.,
Attorney for Respondent.

N. B. SPANGLER,
BELLEFONTE, PA.,
Attorney for Creditors' Committee.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

No._____

Florence F. Dale,
Petitioner,
AGAINST
Centre County Banking Company, a partnership, and John M. Shugert, individually,
Respondents.

Answer of Respondent to Petition For Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:—

The answer of JOHN M. SHUGERT, respondent, to the petition for a writ of certiorari in the above stated case, respectfully shows:—

I. Respondent admits the facts set forth in paragraph one of said petition, but denies that the same is an involuntary proceeding under the Bankruptcy Act of 1898.

II. Respondent admits that the petitioner moved to dismiss the proceedings in bankruptcy, for the reasons set forth in paragraph two of the petition, and for further

answer to said paragraph and sub-sections A, B, C, D, E, and F thereof, states as follows:

A. That the District Court has jurisdiction to allow or determine the petition in bankruptcy filed by the said John M. Shugert.

B. Respondent admits these facts, but avers that the petition filed by the said Shugert is not an involuntary petition under the Bankruptcy Act.

C. Respondent admits that the original petition filed by the said Shugert was a voluntary one, and avers that the amended petition was of like character.

D. Respondent denies these allegations and avers that neither the original nor amended petition showed that the partnership was dissolved and that the entire proceeding has been as to the jurisdiction of the Court, and that no evidence has been heard by the District Court to determine whether or not there was a dissolution of the partnership. Respondent further avers that even though there was a dissolution, the District Court has jurisdiction, if, upon taking of testimony, the evidence shows that the partnership debts remain unpaid and that the partnership and individual members are insolvent.

E. Respondent denies as a matter of law the allegations in said sub-section set forth.

F. The allegations in this sub-section are denied.

III. Respondent admits the facts set forth in paragraph three of said petition.

IV. Respondent admits the facts set forth in paragraph four of said petition, but avers that Florence F. Dale filed an answer, not only to the questions of law, but questions of fact to the original petition filed by the said Shugert in the Bankruptcy Court.

V. Respondent admits the facts set forth in sub-section A of paragraph five of said petition.

Respondent admits the facts set forth in sub-section E. of paragraph five of said petition, except that no where has the District Court or the Circuit Court decided that the filing of the petition by John M. Shugert on behalf of himself, the said partnership and his co–partners, was an involuntary petition under the meaning of the Bankruptcy Act, but that the same was such a petition as said Act authorized a co-partner to file on behalf of himself, the partnership and its members.

Respondent denies sub-section C of paragraph five of said petition, as no such statement, as therein contained, was made in the order of the District Court or in the opinion, and decree of the Circuit Court, and further avers that the petition in bankruptcy filed in the District Court by the said John M. Shugert does not state that there has been any dissolution of the said partnership, by reason of the death of Lavina Catharine Harris, a member of the same, and no testimony has yet been taken before the District Court to determine whether under the written agreement of co-partnership a dissolution was caused by her death. Respondent further avers that under sub-section A of Section five of the Bankruptcy Act of 1898, there being no final settlement of the said co-partnership, the members thereof may be adjudged bankrupts before or after the dissolution of the partnership, and that whether the same occurred is not material in this proceeding.

Respondent admits the facts set forth in sub-section D of paragraph five of said petition, except that the Bankruptcy Act of 1867 did not expressly provide that one partner might file a petition to have the partnership adjudged a bankrupt, nevertheless the appellate courts held that the Bankruptcy Court did have such authority under said Act.

VI. Respondent avers that the facts set forth in paragraph six of said petition are not true, so far as the cases therein cited and relied upon by petitioner are concerned, as the same are not applicable to the facts in this case, but avers that said paragraph, so far as the same relates to the authorities of the Circuit Court of Appeals is concerned, are true and correct.

VII. In answer to paragraph seven of said petition, respondent avers that the questions therein raised for consideration are not such as will ordinarily be considered by this Court on petition for certiorari, for the reason that the same questions can be raised later by the petitioner when declared a bankrupt, and it is unusual to allow a writ of certiorari on an interlocutory order, where the same question may be raised thereafter in the same proceeding.

VIII. In answer to the eighth paragraph of said petition, respondent avers that the jurisdiction of the District Court to declare the petitioner and his co-partners, bankrupts, as contained in the record in this case, has been ruled by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695, 57 L. Ed. 1029, and followed by the Circuit Court of Appeals in this case, and that the allowance of the writ of ceriorari would, therefore, avail the petitioner nothing, but would only cause delay, resulting in great hardship to approximately 1200 creditors, many of whom are in destitute circumstances and in need of whatever pro rata they may obtain in a final settlement of the partnership affairs.

WHEREFORE, your respondent prays this Honorable Court that the writ prayed for by the petitioner be denied, and said petition dismissed, with costs.

JOHN M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY IN CENTRE. } SS:

JOHN M. SHUGERT being duly sworn deposes and says: I am the respondent, hereinabove named. I reside in the Borough of Bellefonte, County of Centre and State of Pennsylvania. Each and every allegation in the foregoing answer is true to my own knowledge, except as to the matters herein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Sworn and subscribed before me this 2 day of October, A. D., 1923.

ELIZABETH C. WALKER
NOTARY PUBLIC
My Com. Expires March 6, 1925.
[Seal]

JOHN M. SHUGERT

BRIEF

RECORD AND PROCEEDINGS IN DISTRICT COURT, AND ORDERS MADE IN PURSUANCE OF SAME. ALLOWANCE OF WRITS OF CERTIORARI.

The Centre County Banking Company, a co-partnership, closed its doors and ceased business, May 13, 1922, because of insolvency, and John M. Shugert, one of the partners of said firm, on June 30, 1922 (Record pages 1, 8, 9 and 10) filed a petition in bankruptcy, on behalf of himself and said firm, in the District Court for the Middle District of Pennsylvania, wherein said firm was engaged in a general banking business.

Subpoenaes were awarded and served, except as to Andrew Breeze, who then resided out of said District, George R. Meek and Florence F. Dale, two of the petitioners, filed answers thereto, raising questions of fact, namely, denying that they were partners, (Record, pages 14, 15, 16 and 17). On these answers appear also the names of their counsel, although the record does not show it, without designating whether the appearance is general or special. An amended petition was filed in said Court by the said Shugert August 26, 1922 (Record, page 56) and after notice and argument by counsel representing all the parties, the same was allowed by the District Court September 15, 1922 (Record, page 54), and in pursuance thereof, subpoenas were awarded and served personally as to all parties, except Andrew Breeze, upon whom constructive service was had by publication.

The case was docketed in the District Court, not as set forth by petitioner in this court, and by respondent so as

to conform therewith, but as follows, (Record page 1):

"In the matter of
"John M. Shugert, Lavina Catherine Harris, deceased,
"George R. Meek, Mary C. Harris, Florence F. Dale,
"and Andrew Breeze, individually and trading as
"Centre County Banking Company,
"Bankrupt."

No testimony has been taken before the District Court to determine the solvency or insolvency of said partnership and the individual members thereof, nor is the written agreement under which said firm did business in evidence.

In the case of Denver v. New York Trust Co., 229 U. S. 1101; 57 L Ed. 132-134, it was stated by this Court in its opinion that "the exceptional power to review, upon certiorari, a decision of the Circuit Court of Appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised."

It is unusual that the questions raised by the petitioners should be heard by this court at this stage of the bankruptcy proceedings. No adjudication in bankruptcy has been made by the District Court.

In the case of in re Oregon Bulletin Printing etc. Co., 3 Sawy. 5229; 18 Fed. Cas. No. 10,560, the Circuit Court of Appeals said:

"No case has been found where a petition for review has been acted on before a final judgment upon the petition in bankruptcy."

It has been held in a number of cases, that, where an interlocutory decision may be reviewed on appeal from a final decree, a petition to revise will rarely be granted.

In re Chotiner, 218 Fed. 813.

In re Horowitz, 250 Fed. 106.

II.

AUTHORITY OF ONE PARTNER TO BRING INTO THE BANKRUPTCY COURT THE PARTNERSHIP AND ITS MEMBERS ON A PETITION FILED BY HIM, WITHOUT THE CONSENT OF THE OTHERS.

The learned Counsel for the petitioners has attempted to place a strict and narrow construction upon the Bankruptcy Act of 1898, whereas the converse of this proposition has been followed by the bankrupt courts.

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In the proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

We deem it unnecessary to cite any authorities to show that the act must be given a liberal construction.

It is conceded by counsel for petitioners that under Section 36 of the Bankruptcy Act of 1867, a partner could bring into the bankruptcy court his non-consenting part-

ners, on the ground that said section expressly provides that he may. It contains no such mandatory provision. Section 36 of said Act is as follows:

> "Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, etc."

This section, as stated by Judge Lowell, is re Carleton 115 Fed. 247:

> "Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided *what should happen* after all had been adjudged bankrupt upon the petition of one partner or of a creditor."

Respondents contend, that the provisions of Section 5 of the Bankruptcy Act of 1898 are much broader than those of Section 36 of the Act of 1867, relating to partnerships. Paragraph (a) of section 5 of the Act 1898 reads as follows:

> "A partnership during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

This includes all kinds of partnerships, except as provided by section 4, and not merely those "in trade" as provided by the Act of 1867. That it was the intention of Congress to thus broaden the scope of the bankruptcy courts and simplify the practice is apparent from the privisions of paragraph (c) of Section 5 of the Act of 1898, which is as follows:

> "The Court of Bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all the partners, and of the administration of the partnership and individual property."

It is plain that one partner may bring into the bank-

ruptcy court, all of the partners, and that its property and that of its members is subject to the jurisdiction of said Court for the purpose of liquidation. There has been diversity of opinion as to whether a partnership as an entity may be adjudicated a bankrupt; and where a partner files a petition in bankruptcy in behalf of himself, the copartnership and its individual members, it has been held in some jurisdictions, that while the property of the individual partners, as well as that of the firm, was subject to the jurisdiction of the bankruptcy Court, that the non-consenting partners could not be adjudicated bankrupts. These questions, under more recent decisions, have been practically settled by the Federal Courts. The better practice, and which is not prohibited by statute, is to adjudicate bankrupt the non-consenting partners, as well as the petitioner.

> "Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury." In Re Forbes, 128 Fed. 137.

As to the practice in proceedings such as the case at bar, we quote the following from the opinion of Judge Lowell in the case above cited:

> "But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as In re Dunnigan (D. C.) 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estate of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy.

Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all it partners. See Vaccaro V. Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Blair (D. C.) 99 Fed. 76; Davis V. Stevens (D. C.) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceeding is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actu-

ally committed by all the partners. Even their privity is not essential. 'An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases.' Lowell on Bankruptcy, 43. A voluntary petition is itself treated as an act of bankruptcy. In re Fowler, I Lowell, 161, Fed. Cas. No. 4, 998; Lowell on Bankruptcy, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See In re Murray (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the

firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

Section 5 of the Bankruptcy Act of 1898, has been construed by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. That case originated by adverse proceeding upon petition of creditors. It has nevertheless established "uniformity of decision", if any were necessary, in cases like the present. The commendation therein of the opinion of Judge Lowell by this Court, in a case similar to the present, and hereinabove quoted, should be a sufficient answer to all of the questions of law raised by the petitioners.

We, therefore, quote in full the opinion of this Court in Francis v. McNeal as follows:

"Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is,

so far as may be, to preserve, not to upset, existing relations. It is true that by Section I, the word 'person,' as used in the act, includes partnership; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from Section 5, clauses c, through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt'. (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.)

"In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

"On the other hand ,it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private

debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, is an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no objection has been taken but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority of Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct."

In the case of re Samuels, 215 Fed. 845, where an attempt was made to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent, the Circuit Court of Appeals, Second Circuit, quoted from Judge Lowell in the Forbes case, and said, inter alia, as follows:

"We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insol-

vent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra."

Again in the case of Yungbluth v. Slipper et al, 185 Fed. 773, where it was held that a voluntary assignment of all the property and assets of a firm operating a private bank, to a receiver, though done by one partner and not participated in by the other, the Circuit Court of Appeals, Ninth Circuit, approved of the opinion of Judge Lowell, in re Forbes, and in referring to his opinion, on page 775 said:

"The true construction of this feature of the bankruptcy law is, we think, best expressed by Judge Lowell, In re Forbes (D. C.) 128 Fed. 137, a case in which, in view of section 5 of the act (Act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. St. 1901, p. 3424), which provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt, he held that the partnership may not be made bankrupt except by an adjudication of all its partners, *and that the only defense a nonconsenting partner can make to the petition is that the partners are able to pay the partnership debts and their own debts, out of the joint or separate estates.*"

In the case of re Carleton, 115 Fed. 246, in which a petition was filed by one member of a partnership, for the purpose of bringing into the bankruptcy court the partnership and his co-partner, the opinion cites authorities to show that neither under the bankruptcy acts of 1841 nor 1867, was it

necessary for one partner to bring the partnership and its individual members into Court, to allege any acts of bankruptcy, other than insolvency of the firm and its individual members. In the opinion on pages 247 and 248, it is stated with reference to the Sections relating to partnerships under these Acts and that of 1898, as follows:

"The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

"Section 14 of the act of 1841 provided:

> "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are here exempted. 5 Stat. 448.'

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

> 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the

> partners, shall be taken, exceptiong such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

> " 'In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. *No.* 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214, In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re

Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 455 Fed. Cas. No. 17,784. * *

"Section 5 of the act of 1898 provides that 'a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867."

It has been almost a universal practice of the bankruptcy courts, where the partnership and one or more, but not all the members of the firm, were adjudicated bankrupt, that the individual property of those not declared bankrupt, was subject to the jurisdiction of the bankruptcy court in the settlement of the partnership indebtedness, and this was held to be the law of the Circuit Court of Appeals, Eight Circuit, even where, on demurer, the petition in bankruptcy was dismissed as to the non-consenting partner.

Armstrong vs. Fisher, 224 Fed. 97.

The rule that the individual property of a partner not adjudicated a bankrupt, shall be administered in the federal courts, the same as a partner, which has been adjudicated, is unfortunate, and is to be avoided wherever the same may be lawfully done. Not having been adjudicated a bankrupt,

such partner may not receive a discharge, as provided by section 14 of the said Act. As was said by this Court in Francis vs. McNeal.

"On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full."

It is apparent that the conflict of decisions under section 5 of the Act of 1898 arose, not from the right of the bankrupt court to administer the individual property of the non-consenting partner, but whether the latter might be declared a bankrupt on a petition alleging only insolvency of the firm and its members.

The weight of authority and the practice as now generally adopted is to adjudicate all partners bankrupts.

III.

GENERAL ORDER VIII.

Counsel for petitioners contend in effect that because the Act of 1867 provided for the issuing of a subpoena (warrant) and that no such provision is made in the Act of 1898, that this Court has exceeded its authority in adopting General Order VIII.

There is nothing in General Order VIII, defining the practice, which violates the Bankrupt Act of 1898, and read in connection with section 14, it is more logical, and the better practice, that the non-consenting partners should likewise be adjudicated bankrupts.

Section 30 of the Bankruptcy Act of 1898, expressly provides that "All necessary rules, forms, and orders *as to*

procedure and for carrying this Act into force and effect, shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." This General Order defines only the methods of procedure as to the non-consenting partner where the bankruptcy court has acquired jurisdiction of one partner as provided by paragraph C of Section 5 of said Act.

If additional authority were needed, it could be found in the Act of Congress of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. at L. 81) Rev. Stat. 716, which empowers this Court, and the Circuit and District Courts of the United States "to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usuages and principles of law."

> "The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law."
> In re Gerber, 186 Fed. 694.
> Sabin v. Blake-McFall Co., 223 Fed. 505.
> In re Langford, Felts & Myers, 225 Fed. 314.
> In re Hoyt & Mitchell, 127 Fed. 969.

IV.

JURISDICTION OF BANKRUPTCY COURT WHERE ONE MEMBER OF PARTNERSHIP DIES PRIOR TO THE FILING OF THE PETITION.

The petition in bankruptcy (Record 56) set forth:

> "That your petitioner and George R. Meek, Florence F. Dale and Andrew Breeze, who survive Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, etc."

The petition alleges no dissolution of the partnership, either by the death of Lavina Catherine Harris, or otherwise, and there is no presumption of such dissolution, by a

mere statement in the petition that she is dead and that her estate is being administered by the Orphans' Court. But even though a dissolution had occurred, which is not a fact, by reason of her death; under paragraph (a) of Section 5 of the Act of 1898, the surviving members, where no final settlement has been made, may be adjudged bankrupt, not by separate petitions, but as members of the partnership, which is brought in with them. This construction is more apparent since the decision of this Court in the McNeal case, as to the entity doctrine of partnerships.

The petition (Record 57) also sets forth:

> "That there has been no final settlement of the partnership business of said parties, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than one thousand dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

In re Meyer, 98 Fed. 976, the partnership consisted of Charles H. Meyer; Henry L. Meyer and Joseph R. Dickinson. Charles H. Meyer died prior to the presentation of a petition to the District Court to declare said partnership and its members bankrupts. The District Court declared the partnership and Henry L. Meyer, individually, bankrupts, which adjudication was affirmed by the Circuit Court Court of Appeals, Second Circuit.

In the case of Vaccaro et al vs. Security Bank of Memphis, et al 103 Fed. 432, the Circuit Court of Appeals, Sixth District, where a partnership was composed of three brothers, A. Vaccaro, one of them having died prior to proceedings in bankruptcy against the partnership, said Court referring to the case of Re Meyer, stated:

> "Again, the act declares that the Court, having jurisdiction of one of the partners, may have jurisdic-

tion of all, 'and of the administration of partnership and individual property.' In re Meyer, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency law of 1838, as interpreted by the Massachusetts decisions. Philip v. Parker, 2 Cush. 175; Thompson vs. Thompson, 4 Cush. 127; Dearborn v. Keith, 5 Cush. 224; Hanson v. Paige, 3 Gray 239."

In re L. Stein and Company, 127 Fed. 547, the Circuit Court of Appeals, 7th Circuit, where one of the partners was insane, stated, inter alia, as follows:

"We perceive no valid reason why this manifest purpose of the bankruptcy act should not have full effect. In the case of a decedent the proper probate court assumes the charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the partnership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after payment of partnership debts. So, also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the copartnership debt, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—than an insane person may not be adjudicated a bankrupt (upon which question see In re Pratt, 6 Nat. Bankr. Rep. 276, Fed. Cas. No. 11,369; In re Weitzel, 7 Biss. 289, Fed. Cas.

No. 17,365), nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject partnership property to the payment of partnership debts and for an adjudication of bankruptcy against the sane partner. The argument in the cases cited is so complete and satisfactory that the subject needs no further discussion."

V.

DISSOLUTION OF PARTNERSHIP.

Even though a dissolution had occurred by reason of the death of Lavina Catherine Harris, which is not a fact, where there is no final settlement, as provided by paragraph (a), Section 5 of the Act of 1898, the bankrupt Court has jurisdiction over the partnership and its surviving members.

"Under Bankr. Act July 1, 1898, c. 541, Section 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership after its dissolution by the death of one partner may be adjudged a bankrupt, and in such a case the proceedings are not invalidated by the fact that the petition did not refer to the deceased partner nor disclose that the partners named were surviving partners, where the business was being continued as provided in the partnership articles."
In re Coe et al, 157 Fed. 308.

To the same effect is the case of In re Pinson & Co., 180 Fed. 787, where the Court said:

"The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are

unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

Although there may be a dissolution of the partnership, where assets or debts of a partnership remain, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

Holmes v. Hamilton, et al, 160 Fed. 922

In the case last cited, on the question of dissolution, Gilbert, Circuit Judge, stated, inter alia, as follows:

"GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution creditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed his connection months prior thereto, and it is argued that at the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In re Crockett et al., 2 Ben. 514, Fed. Cas. No. 3, 402; In re Foster, 3 Ben.

386, Fed. Cas. No. 4,962; In re Noonan, 3 Biss. 491, Fed. Cas. No. 10,292; In re Stowers et al, I Lowell, 528, Fed. Cas. No. 13,516; In re Hirsch et al (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In re L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272."

In the case of Fackleman, 248 Fed. 565, cited by counsel for petitioners, Pomeroy &Fackleman were partners in the grocery business in California; Fackleman sold out to Pomeroy, who continued the business in his own name until the time of his death. Fackleman had moved to Nebraska. Subsequently to the death of Pomeroy, a proceeding in bankruptcy was instituted in the District Court of California, against Fackleman, as surviving partner of Pomeroy & Fackleman, and against the latter individually. By reason of the non-residence of Fackleman, and that the firm had been out of existence for a number of years, the court had no jurisdiction.

Neither does the case of in re Evans, 161 Fed. 590, cited by counsel for petitioners, apply. There the partnership consisted of two persons. One member was dead. The other member continued the business for a number of years, and then filed a voluntary petition that he was the sole owner of the business conducted by him after the death of his partner, under the name of Evans & Co. Creditors then intervened to bring in other parties as members. No attempt was made to hold the estate of the deceased partner.

The argument of the learned counsel for petitioners that, where the surviving members are adjudicated bankrupt, there is a consequent interference with the administration of the Probate Court, of the estate of the deceased partner, is illogical. Would there be less interference if a proceeding had been instituted in the local Court by John M. Shugert, under our insolvent laws or by bill in equity? In either case, the jurisdiction as to the surviving partners, would be in the Common Pleas Court. The creditors of the partnership would still be subject to a divided jurisdiction, with no better advantage than under the present proceeding. Such a proceeding would not oust the jurisdiction of the Orphans' Court in the settlement of the estate of the deceased partner.

The case of Temple & Workmen, and Temple & Ledyard, cited by counsel for petitioners, does not apply. That case arose under the Bankruptcy Act of 1867, Section 36, relating to partnerships, made no provision for an adjudication of bankruptcy "after its dissolution and before the final settlement" as provided by Section 5 of the Act of 1898.

The Bankruptcy Court undoubtedly has acquired jurisdiction of one of the partners, namely, John M. Shugert, and may, therefore, as provided by clause (c) of Section 5 of the Act, have jurisdiction of the others. The authorities show that it was never intended by Congress in passing the act of 1898, that a petitioning partner should be required to allege any other act of bankruptcy than insolvency as against the non-consenting partners. To be compelled to do so, would defeat the very purpose of the act. Undoubtedly, there are many instances where none of the acts of bankruptcy defined in Section 3 have been committed by any member of a partnership, except that of insolvency. If thereby one member could not bring into court the partnership and its non-consenting members, such petitioner

could not be relieved by an individual voluntary petition, of his partnership liability. He might not be insolvent, so far as his individual debts are concerned. He would thus be deprived of the very purposes for which the act was passed, and would be excluded from the express provisions of Section 4 which defines who may or may not become bankrupts.

All the questions of law raised by the petitioners were decided by the Circuit Court in a very lucid opinion by Judge Davis. As a summary of all the questions involved, we quote his opinion, at length, which is as follows:

DAVIS, Circuit Judge. All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoena on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and, second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the

partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5 a and c, of the Act of 1898 provides that:

> (a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by those rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not voluntary petitions in Bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a vol-

untary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires it to hold that it did? If the Act of 1898 has provided that "a partnership—may be adjudged a bankrupt" on the petition of "any creditor", this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "anyone" of the partners, and by "any creditor". The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that: "Any member of a partnership who refuses to *join in* the petition—shall be entitled to resist the prayer" etc. By the words "join in", the Supreme Court has in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in". Judge Lowell held in the case of In re Forbes et al. 128 Fed. 137,140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if

"any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis v. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong v. Fisher et al., 224 Fed. 97; Francis v. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth v. Slipper et al., 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question." Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al. v. Security Bank of Memphis et al., 130 Fed. 436,443. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts, it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is AFFIRMED.

In conclusion respondent contends that the Circuit Court made no error in sustaining the order of the District Court. That there is no such diversity of opinion by the District and Circuit Courts on the questions of law raised, as would move this Court to grant the writs of certiorari for the mere purpose of establishing "uniformity of decision" in matters of practice under the bankruptcy Act, and especially in view of the hardship imposed upon many destitute persons, who are creditors of the Centre County Banking Company, and who have awaited patiently the termination of this litigation, and who are in dire need of whatever they may be able to obtain on a final settlement.

We, therefore, submit that the writs of certiorari should be denied, with costs to petitioners.

Respectfully submitted,

S. D. GETTIG,
Attorney for Respondent.

N. B. SPANGLER,
Attorney for Creditors' Committee.

FILED
OCT 6 1923
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~592~~ 193 October Term, 1923.

ANDREW BREEZE,

Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,

Respondents.

Answer of Respondent and Brief to Petition of Andrew Breeze for Writ of Certiorari.

S. D. GETTIG,
BELLEFONTE, PA.,
Attorney for Respondent.

N. B. SPANGLER,
BELLEFONTE, PA.,
Attorney for Creditors' Committee.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

No._____

Andrew Breeze,
Petitioner,
AGAINST
Centre County Banking Company, a partnership, and John M. Shugert, individually,
Respondents.

Answer of Respondent to Petition For Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:—

The answer of JOHN M. SHUGERT, respondent, to the petition for a writ of certiorari in the above stated case, respectfully shows:—

I. Respondent admits the facts set forth in paragraph one of said petition, but denies that the same is an involuntary proceeding under the Bankruptcy Act of 1898.

II. Respondent admits that the petitioner moved to dismiss the proceedings in bankruptcy, for the reasons set forth in paragraph two of the petition, and for further

answer to said paragraph and sub-sections A, B, C, D, E, and F thereof, states as follows:

A. That the District Court has jurisdiction to allow or determine the petition in bankruptcy filed by the said John M. Shugert.

B. Respondent admits these facts, but avers that the petition filed by the said Shugert is not an involuntary petition under the Bankruptcy Act.

C. Respondent admits that the original petition filed by the said Shugert was a voluntary one, and avers that the amended petition was of like character.

D. Respondent denies these allegations and avers that neither the original nor amended petition showed that the partnership was dissolved and that the entire proceeding has been as to the jurisdiction of the Court, and that no evidence has been heard by the District Court to determine whether or not there was a dissolution of the partnership. Respondent further avers that even though there was a dissolution, the District Court has jurisdiction, if, upon taking of testimony, the evidence shows that the partnership debts remain unpaid and that the partnership and individual members are insolvent.

E. Respondent denies as a matter of law the allegations in said sub-section set forth.

F. The allegations in this sub-section are denied.

III. Respondent admits the facts set forth in paragraph three of said petition.

IV. Respondent admits the facts set forth in paragraph four of said petition.

V. Respondent admits the facts set forth in sub-section A of paragraph five of said petition.

Respondent admits the facts set forth in sub-section E. of paragraph five of said petition, except that no where has the District Court or the Circuit Court decided that the filing of the petition by John M. Shugert on behalf of himself, the said partnership and his co–partners, was an involuntary petition under the meaning of the Bankruptcy Act, but that the same was such a petition as said Act authorized a co-partner to file on behalf of himself, the partnership and its members.

Respondent denies sub-section C of paragraph five of said petition, as no such statement, as therein contained, was made in the order of the District Court or in the opinion, and decree of the Circuit Court, and further avers that the petition in bankruptcy filed in the District Court by the said John M. Shugert does not state that there has been any dissolution of the said partnership, by reason of the death of Lavina Catharine Harris, a member of the same, and no testimony has yet been taken before the District Court to determine whether under the written agreement of co-partnership a dissolution was caused by her death. Respondent further avers that under sub-section A of Section five of the Bankruptcy Act of 1898, there being no final settlement of the said co-partnership, the members thereof may be adjudged bankrupts before or after the dissolution of the partnership, and that whether the same occurred is not material in this proceeding.

Respondent admits the facts set forth in sub-section D of paragraph five of said petition, except that the Bankruptcy Act of 1867 did not expressly provide that one partner might file a petition to have the partnership adjudged a bankrupt, nevertheless the appellate courts held that the Bankruptcy Court did have such authority under said Act.

VI. Respondent avers that the facts set forth in paragraph six of said petition are not true, so far as the cases therein cited and relied upon by petitioner are concerned, as the same are not applicable to the facts in this case, but avers that said paragraph, so far as the same relates to the authorities of the Circuit Court of Appeals is concerned, are true and correct.

VII. In answer to paragraph seven of said petition, respondent avers that the questions therein raised for consideration are not such as will ordinarily be considered by this Court on petition for certiorari, for the reason that the same questions can be raised later by the petitioner when declared a bankrupt, and it is unusual to allow a writ of certiorari on an interlocutory order, where the same question may be raised thereafter in the same proceeding.

VIII. In answer to the eighth paragraph of said petition, respondent avers that the jurisdiction of the District Court to declare the petitioner and his co-partners, bankrupts, as contained in the record in this case, has been ruled by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695, 57 L. Ed. 1029, and followed by the Circuit Court of Appeals in this case, and that the allowance of the writ of ceriorari would, therefore, avail the petitioner nothing, but would only cause delay, resulting in great hardship to approximately 1200 creditors, many of whom are in destitute circumstances and in need of whatever pro rata they may obtain in a final settlement of the partnership affairs.

WHEREFORE, your respondent prays this Honorable Court that the writ prayed for by the petitioner be denied, and said petition dismissed, with costs.

JOHN M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY IN CENTRE. } SS:

JOHN M. SHUGERT being duly sworn deposes and says: I am the respondent, hereinabove named. I reside in the Borough of Bellefonte, County of Centre and State of Pennsylvania. Each and every allegation in the foregoing answer is true to my own knowledge, except as to the matters herein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Sworn and subscribed before me this 2 day of October, A. D., 1923.

JOHN M. SHUGERT

ELIZABETH C. WALKER
NOTARY PUBLIC
My Com. Expires March 6, 1925.

[Seal]

BRIEF

RECORD AND PROCEEDINGS IN DISTRICT COURT, AND ORDERS MADE IN PURSUANCE OF SAME. ALLOWANCE OF WRITS OF CERTIORARI.

The Centre County Banking Company, a co-partnership, closed its doors and ceased business, May 13, 1922, because of insolvency, and John M. Shugert, one of the partners of said firm, on June 30, 1922 (Record pages 1, 8, 9 and 10) filed a petition in bankruptcy, on behalf of himself and said firm, in the District Court for the Middle District of Pennsylvania, wherein said firm was engaged in a general banking business.

Subpoenaes were awarded and served, except as to Andrew Breeze, who then resided out of said District, George R. Meek and Florence F. Dale, two of the petitioners, filed answers thereto, raising questions of fact, namely, denying that they were partners, (Record, pages 14, 15, 16 and 17). On these answers appear also the names of their counsel, although the record does not show it, without designating whether the appearance is general or special. An amended petition was filed in said Court by the said Shugert August 26, 1922 (Record, page 56) and after notice and argument by counsel representing all the parties, the same was allowed by the District Court September 15, 1922 (Record, page 54), and in pursuance thereof, subpoenas were awarded and served personally as to all parties, except Andrew Breeze, upon whom constructive service was had by publication.

The case was docketed in the District Court, not as set forth by petitioner in this court, and by respondent so as

to conform therewith, but as follows, (Record page 1):

"In the matter of

"John M. Shugert, Lavina Catherine Harris, deceased, "George R. Meek, Mary C. Harris, Florence F. Dale, "and Andrew Breeze, individually and trading as "Centre County Banking Company,

"Bankrupt."

No testimony has been taken before the District Court to determine the solvency or insolvency of said partnership and the individual members thereof, nor is the written agreement under which said firm did business in evidence.

In the case of Denver v. New York Trust Co., 229 U. S. 1101; 57 L Ed. 132-134, it was stated by this Court in its opinion that "the exceptional power to review, upon certiorari, a decision of the Circuit Court of Appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised."

It is unusual that the questions raised by the petitioners should be heard by this court at this stage of the bankruptcy proceedings. No adjudication in bankruptcy has been made by the District Court.

In the case of in re Oregon Bulletin Printing etc. Co., 3 Sawy. 5229; 18 Fed. Cas. No. 10,560, the Circuit Court of Appeals said:

"No case has been found where a petition for review has been acted on before a final judgment upon the petition in bankruptcy."

It has been held in a number of cases, that, where an interlocutory decision may be reviewed on appeal from a final decree, a petition to revise will rarely be granted.

In re Chotiner, 218 Fed. 813.

In re Horowitz, 250 Fed. 106.

II.

AUTHORITY OF ONE PARTNER TO BRING INTO THE BANKRUPTCY COURT THE PARTNERSHIP AND ITS MEMBERS ON A PETITION FILED BY HIM, WITHOUT THE CONSENT OF THE OTHERS.

The learned Counsel for the petitioners has attempted to place a strict and narrow construction upon the Bankruptcy Act of 1898, whereas the converse of this proposition has been followed by the bankrupt courts.

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In the proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

We deem it unnecessary to cite any authorities to show that the act must be given a liberal construction.

It is conceded by counsel for petitioners that under Section 36 of the Bankruptcy Act of 1867, a partner could bring into the bankruptcy court his non-consenting part-

ners, on the ground that said section expressly provides that he may. It contains no such mandatory provision. Section 36 of said Act is as follows:

> "Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, etc."

This section, as stated by Judge Lowell, is re Carleton 115 Fed. 247:

> "Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided *what should happen* after all had been adjudged bankrupt upon the petition of one partner or of a creditor."

Respondents contend, that the provisions of Section 5 of the Bankruptcy Act of 1898 are much broader than those of Section 36 of the Act of 1867, relating to partnerships. Paragraph (a) of section 5 of the Act 1898 reads as follows:

> "A partnership during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

This includes all kinds of partnerships, except as provided by section 4, and not merely those "in trade" as provided by the Act of 1867. That it was the intention of Congress to thus broaden the scope of the bankruptcy courts and simplify the practice is apparent from the privisions of paragraph (c) of Section 5 of the Act of 1898, which is as follows:

> "The Court of Bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all the partners, and of the administration of the partnership and individual property."

It is plain that one partner may bring into the bank-

ruptcy court, all of the partners, and that its property and that of its members is subject to the jurisdiction of said Court for the purpose of liquidation. There has been diversity of opinion as to whether a partnership as an entity may be adjudicated a bankrupt; and where a partner files a petition in bankruptcy in behalf of himself, the copartnership and its individual members, it has been held in some jurisdictions, that while the property of the individual partners, as well as that of the firm, was subject to the jurisdiction of the bankruptcy Court, that the non-consenting partners could not be adjudicated bankrupts. These questions, under more recent decisions, have been practically settled by the Federal Courts. The better practice, and which is not prohibited by statute, is to adjudicate bankrupt the non-consenting partners, as well as the petitioner.

> "Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury." In Re Forbes, 128 Fed. 137.

As to the practice in proceedings such as the case at bar, we quote the following from the opinion of Judge Lowell in the case above cited:

> "But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as In re Dunnigan (D. C.) 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estate of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy.

Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all it partners. See Vaccaro V. Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Blair (D. C.) 99 Fed. 76; Davis V. Stevens (D. C.) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceeding is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actu-

ally committed by all the partners. Even their privity is not essential. 'An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases.' Lowell on Bankruptcy, 43. A voluntary petition is itself treated as an act of bankruptcy. In re Fowler, I Lowell, 161, Fed. Cas. No. 4, 998; Lowell on Bankruptcy, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See In re Murray (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the

firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

Section 5 of the Bankruptcy Act of 1898, has been construed by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. That case originated by adverse proceeding upon petition of creditors. It has nevertheless established "uniformity of decision", if any were necessary, in cases like the present. The commendation therein of the opinion of Judge Lowell by this Court, in a case similar to the present, and hereinabove quoted, should be a sufficient answer to all of the questions of law raised by the petitioners.

We, therefore, quote in full the opinion of this Court in Francis v. McNeal as follows:

"Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is,

so far as may be, to preserve, not to upset, existing relations. It is true that by Section I, the word 'person,' as used in the act, includes partnership; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from Section 5, clauses c, through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt'. (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.)

"In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

"On the other hand ,it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private

debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, is an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no objection has been taken but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority of Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct."

In the case of re Samuels, 215 Fed. 845, where an attempt was made to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent, the Circuit Court of Appeals, Second Circuit, quoted from Judge Lowell in the Forbes case, and said, inter alia, as follows:

"We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insol-

vent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra."

Again in the case of Yungbluth v. Slipper et al, 185 Fed. 773, where it was held that a voluntary assignment of all the property and assets of a firm operating a private bank, to a receiver, though done by one partner and not participated in by the other, the Circuit Court of Appeals, Ninth Circuit, approved of the opinion of Judge Lowell, in re Forbes, and in referring to his opinion, on page 775 said:

"The true construction of this feature of the bankruptcy law is, we think, best expressed by Judge Lowell, In re Forbes (D. C.) 128 Fed. 137, a case in which, in view of section 5 of the act (Act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. St. 1901, p. 3424), which provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt, he held that the partnership may not be made bankrupt except by an adjudication of all its partners, *and that the only defense a nonconsenting partner can make to the petition is that the partners are able to pay the partnership debts and their own debts, out of the joint or separate estates.*"

In the case of re Carleton, 115 Fed. 246, in which a petition was filed by one member of a partnership, for the purpose of bringing into the bankruptcy court the partnership and his co-partner, the opinion cites authorities to show that neither under the bankruptcy acts of 1841 nor 1867, was it

necessary for one partner to bring the partnership and its individual members into Court, to allege any acts of bankruptcy, other than insolvency of the firm and its individual members. In the opinion on pages 247 and 248, it is stated with reference to the Sections relating to partnerships under these Acts and that of 1898, as follows:

"The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

"Section 14 of the act of 1841 provided:

> "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are here exempted. 5 Stat. 448.'

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

> 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the

partners, shall be taken, exceptiong such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

> " 'In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. *No.* 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214, In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re

Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 455 Fed. Cas. No. 17,784. * *

"Section 5 of the act of 1898 provides that 'a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867."

It has been almost a universal practice of the bankruptcy courts, where the partnership and one or more, but not all the members of the firm, were adjudicated bankrupt, that the individual property of those not declared bankrupt, was subject to the jurisdiction of the bankruptcy court in the settlement of the partnership indebtedness, and this was held to be the law of the Circuit Court of Appeals, Eight Circuit, even where, on demurer, the petition in bankruptcy was dismissed as to the non-consenting partner.

Armstrong vs. Fisher, 224 Fed. 97.

The rule that the individual property of a partner not adjudicated a bankrupt, shall be administered in the federal courts, the same as a partner, which has been adjudicated, is unfortunate, and is to be avoided wherever the same may be lawfully done. Not having been adjudicated a bankrupt,

such partner may not receive a discharge, as provided by section 14 of the said Act. As was said by this Court in Francis vs. MeNeal.

"On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full."

It is apparent that the conflict of decisions under section 5 of the Act of 1898 arose, not from the right of the bankrupt court to administer the individual property of the non-consenting partner, but whether the latter might be declared a bankrupt on a petition alleging only insolvency of the firm and its members.

The weight of authority and the practice as now generally adopted is to adjudicate all partners bankrupts.

III.

GENERAL ORDER VIII.

Counsel for petitioners contend in effect that because the Act of 1867 provided for the issuing of a subpoena (warrant) and that no such provision is made in the Act of 1898, that this Court has exceeded its authority in adopting General Order VIII.

There is nothing in General Order VIII, defining the practice, which violates the Bankrupt Act of 1898, and read in connection with section 14, it is more logical, and the better practice, that the non-consenting partners should likewise be adjudicated bankrupts.

Section 30 of the Bankruptcy Act of 1898, expressly provides that "All necessary rules, forms, and orders *as to*

procedure and for carrying this Act into force and effect, shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." This General Order defines only the methods of procedure as to the non-consenting partner where the bankruptcy court has acquired jurisdiction of one partner as provided by paragraph C of Section 5 of said Act.

If additional authority were needed, it could be found in the Act of Congress of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. at L. 81) Rev. Stat. 716, which empowers this Court, and the Circuit and District Courts of the United States "to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usuages and principles of law."

> "The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law."
> In re Gerber, 186 Fed. 694.
> Sabin v. Blake-McFall Co., 223 Fed. 505.
> In re Langford, Felts & Myers, 225 Fed. 314.
> In re Hoyt & Mitchell, 127 Fed. 969.

IV.

JURISDICTION OF BANKRUPTCY COURT WHERE ONE MEMBER OF PARTNERSHIP DIES PRIOR TO THE FILING OF THE PETITION.

The petition in bankruptcy (Record 56) set forth:

> "That your petitioner and George R. Meek, Florence F. Dale and Andrew Breeze, who survive Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, etc."

The petition alleges no dissolution of the partnership, either by the death of Lavina Catherine Harris, or otherwise, and there is no presumption of such dissolution, by a

mere statement in the petition that she is dead and that her estate is being administered by the Orphans' Court. But even though a dissolution had occurred, which is not a fact, by reason of her death; under paragraph (a) of Section 5 of the Act of 1898, the surviving members, where no final settlement has been made, may be adjudged bankrupt, not by separate petitions, but as members of the partnership, which is brought in with them. This construction is more apparent since the decision of this Court in the McNeal case, as to the entity doctrine of partnerships.

The petition (Record 57) also sets forth:

> "That there has been no final settlement of the partnership business of said parties, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than one thousand dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

In re Meyer, 98 Fed. 976, the partnership consisted of Charles H. Meyer; Henry L. Meyer and Joseph R. Dickinson. Charles H. Meyer died prior to the presentation of a petition to the District Court to declare said partnership and its members bankrupts. The District Court declared the partnership and Henry L. Meyer, individually, bankrupts, which adjudication was affirmed by the Circuit Court Court of Appeals, Second Circuit.

In the case of Vaccaro et al vs. Security Bank of Memphis, et al 103 Fed. 432, the Circuit Court of Appeals, Sixth District, where a partnership was composed of three brothers, A. Vaccaro, one of them having died prior to proceedings in bankruptcy against the partnership, said Court referring to the case of Re Meyer, stated:

> "Again, the act declares that the Court, having jurisdiction of one of the partners, may have jurisdic-

tion of all, 'and of the administration of partnership and individual property.' In re Meyer, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency law of 1838, as interpreted by the Massachusetts decisions. Philip v. Parker, 2 Cush. 175; Thompson vs. Thompson, 4 Cush. 127; Dearborn v. Keith, 5 Cush. 224; Hanson v. Paige, 3 Gray 239."

In re L. Stein and Company, 127 Fed. 547, the Circuit Court of Appeals, 7th Circuit, where one of the partners was insane, stated, inter alia, as follows:

"We perceive no valid reason why this manifest purpose of the bankruptcy act should not have full effect. In the case of a decedent the proper probate court assumes the charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the partnership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after payment of partnership debts. So, also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the copartnership debt, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—than an insane person may not be adjudicated a bankrupt (upon which question see In re Pratt, 6 Nat. Bankr. Rep. 276, Fed. Cas. No. 11,369; In re Weitzel, 7 Biss. 289, Fed. Cas.

No. 17,365), nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject partnership property to the payment of partnership debts and for an adjudication of bankruptcy against the sane partner. The argument in the cases cited is so complete and satisfactory that the subject needs no further discussion."

V.

DISSOLUTION OF PARTNERSHIP.

Even though a dissolution had occurred by reason of the death of Lavina Catherine Harris, which is not a fact, where there is no final settlement, as provided by paragraph (a), Section 5 of the Act of 1898, the bankrupt Court has jurisdiction over the partnership and its surviving members.

"Under Bankr. Act July 1, 1898, c. 541, Section 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership after its dissolution by the death of one partner may be adjudged a bankrupt, and in such a case the proceedings are not invalided by the fact that the petition did not refer to the deceased partner nor disclose that the partners named were surviving partners, where the business was being continued as provided in the partnership articles."
In re Coe et al, 157 Fed. 308.

To the same effect is the case of In re Pinson & Co., 180 Fed. 787, where the Court said:

"The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are

unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

Although there may be a dissolution of the partnership, where assets or debts of a partnership remain, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

Holmes v. Hamilton, et al, 160 Fed. 922

In the case last cited, on the question of dissolution, Gilbert, Circuit Judge, stated, inter alia, as follows:

"GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution crditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed his connection months prior thereto, and it is argued that at the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In re Crockett et al., 2 Ben. 514, Fed. Cas. No. 3, 402; In re Foster, 3 Ben.

386, Fed. Cas. No. 4,962; In re Noonan, 3 Biss. 491, Fed. Cas. No. 10,292; In re Stowers et al, I Lowell, 528, Fed. Cas. No. 13,516; In re Hirsch et al (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In re L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272."

In the case of Fackleman, 248 Fed. 565, cited by counsel for petitioners, Pomeroy &Fackleman were partners in the grocery business in California; Fackleman sold out to Pomeroy, who continued the business in his own name until the time of his death. Fackleman had moved to Nebraska. Subsequently to the death of Pomeroy, a proceeding in bankruptcy was instituted in the District Court of California, against Fackleman, as surviving partner of Pomeroy & Fackleman, and against the latter individually. By reason of the non-residence of Fackleman, and that the firm had been out of existence for a number of years, the court had no jurisdiction.

Neither does the case of in re Evans, 161 Fed. 590, cited by counsel for petitioners, apply. There the partnership consisted of two persons. One member was dead. The other member continued the business for a number of years, and then filed a voluntary petition that he was the sole owner of the business conducted by him after the death of his partner, under the name of Evans & Co. Creditors then intervened to bring in other parties as members. No attempt was made to hold the estate of the deceased partner.

The argument of the learned counsel for petitioners that, where the surviving members are adjudicated bankrupt, there is a consequent interference with the administration of the Probate Court, of the estate of the deceased partner, is illogical. Would there be less interference if a proceeding had been instituted in the local Court by John M. Shugert, under our insolvent laws or by bill in equity? In either case, the jurisdiction as to the surviving partners, would be in the Common Pleas Court. The creditors of the partnership would still be subject to a divided jurisdiction, with no better advantage than under the present proceeding. Such a proceeding would not oust the jurisdiction of the Orphans' Court in the settlement of the estate of the deceased partner.

The case of Temple & Workmen, and Temple & Ledyard, cited by counsel for petitioners, does not apply. That case arose under the Bankruptcy Act of 1867, Section 36, relating to partnerships, made no provision for an adjudication of bankruptcy "after its dissolution and before the final settlement" as provided by Section 5 of the Act of 1898.

The Bankruptcy Court undoubtedly has acquired jurisdiction of one of the partners, namely, John M. Shugert, and may, therefore, as provided by clause (c) of Section 5 of the Act, have jurisdiction of the others. The authorities show that it was never intended by Congress in passing the act of 1898, that a petitioning partner should be required to allege any other act of bankruptcy than insolvency as against the non-consenting partners. To be compelled to do so, would defeat the very purpose of the act. Undoubtedly, there are many instances where none of the acts of bankruptcy defined in Section 3 have been committed by any member of a partnership, except that of insolvency. If thereby one member could not bring into court the partnership and its non-consenting members, such petitioner

could not be relieved by an individual voluntary petition, of his partnership liability. He might not be insolvent, so far as his individual debts are concerned. He would thus be deprived of the very purposes for which the act was passed, and would be excluded from the express provisions of Section 4 which defines who may or may not become bankrupts.

All the questions of law raised by the petitioners were decided by the Circuit Court in a very lucid opinion by Judge Davis. As a summary of all the questions involved, we quote his opinion, at length, which is as follows:

DAVIS, Circuit Judge. All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoena on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and, second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the

partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5 a and c, of the Act of 1898 provides that:

> (a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by those rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not voluntary petitions in Bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a vol-

untary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires it to hold that it did? If the Act of 1898 has provided that "a partnership—may be adjudged a bankrupt" on the petition of "any creditor", this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "anyone" of the partners, and by "any creditor". The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that: "Any member of a partnership who refuses to *join in* the petition—shall be entitled to resist the prayer" etc. By the words "join in", the Supreme Court has in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in". Judge Lowell held in the case of In re Forbes et al. 128 Fed. 137,140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if

"any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis v. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong v. Fisher et al., 224 Fed. 97; Francis v. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth v. Slipper et al., 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question." Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al. v. Security Bank of Memphis et al., 130 Fed. 436,443. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts, it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is AFFIRMED.

In conclusion respondent contends that the Circuit Court made no error in sustaining the order of the District Court. That there is no such diversity of opinion by the District and Circuit Courts on the questions of law raised, as would move this Court to grant the writs of certiorari for the mere purpose of establishing "uniformity of decision" in matters of practice under the bankruptcy Act, and especially in view of the hardship imposed upon many destitute persons, who are creditors of the Centre County Banking Company, and who have awaited patiently the termination of this litigation, and who are in dire need of whatever they may be able to obtain on a final settlement.

We, therefore, submit that the writs of certiorari should be denied, with costs to petitioners.

Respectfully submitted,

S. D. GETTIG,
Attorney for Respondent.

N. B. SPANGLER,
Attorney for Creditors' Committee.

Office Supreme Court
FILED
MAR 3 1924
WM. R. STANSB
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IN THE

Supreme Court of the United States

NO. [redacted] 191 OCTOBER TERM, 1923.

GEO. R. MEEK,
PETITIONER,

v.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,
RESPONDENTS.

NO. [redacted] 192 OCTOBER TERM, 1923.

FLORENCE F. DALE,
PETITIONER,

v.

SAME,
RESPONDENTS.

NO. [redacted] 193 OCTOBER TERM, 1923.

ANDREW BREEZE,
PETITIONER,

v.

SAME,
RESPONDENTS.

CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THIRD DISTRICT.

SAMUEL D. GETTIG,
Bellefonte, Pa.,
Attorney for Respondents.

NEWTON B. SPANGLER,
Bellefonte, Pa.,
Attorney for Creditors' Committee.

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COUNTER-STATEMENT OF CASE.

The Centre County Banking Company was organized under written articles of co-partnership, made the first day of January, 1868, and from said date was engaged in a general banking business in the Borough of Bellefonte, Centre County, Pennsylvania, until the 13th day of May, 1922, when its doors were closed by reason of its insolvency. The liabilities at the time they quit business were approximately $521,000. The appraised value of the partnership property is approximately $272,000. As is the case with almost every institution of this kind, many of the creditors had deposited in said bank, at the time its doors were closed, their life's savings and they are in destitute circumstances.

On the 30th day of June, 1922, John M. Shugert, one of the partners in said bank, filed a petition in bankruptcy on behalf of himself and said partnership, in which official form for petitions in bankruptcy was followed as near as practicable (Record 8, 9, and 10). In pursuance of said petition subpoenaes were issued and served upon George R. Meek and Florence F. Dale, but no service was had upon Andrew Breeze at his usual place of residence, at Downingtown, in the County of Chester, in the Eastern District of Pennsylvania, and publication as to him was ordered for the purpose of obtaining constructive service. To the petition filed by the said Shugert, on behalf of himself and said partnership. answers were filed by George R. Meek and Florence F. Dale. The said Meek and Mrs. Dale both denied in said answers that they were partners in the Centre County Banking Company (Record 14, 15 and 16). To these answers, as will appear by same, Harry Keller and Orvis and Zerby appeared as Attorneys for George R. Meek, and Richard L. Bigelow of Hazelton, Pennsylvania, appeared as Attorneys for Florence F. Dale. The docket entries in

the record, as well as said answers, do not show the appearance of counsel, except in the case of Mr. Bigelow, who appeared by praecipe July 25, 1922, and who on October 9, 1922, withdrew his appearance for Mrs. Dale (Record 6). We do not think that counsel for petitioners will deny their appearance to these answers.

Upon the filing of said answers the matter of a hearing upon petition was referred by the Court to M. Ward Fleming. Counsel for George R. Meek and Florence F. Dale appeared on the day of said hearing, alleging that the said Referee had no jurisdiction in the matter and no testimony was taken (Record 23 and 38), and subsequently the matter was referred by petition to the District Court (Record 7 and 32), who on August 22, 1922, granted rules (Record 26 and 41). To these petitions to the District Court, alleging that the Court had no jurisdiction to issue a subpoena in the form, in which it was issued, answers were filed by John M. Shugert (Record 27 and 42). After argument on September 15, 1922, the District Court quashed the subpoenas, which had been served on Florence F. Dale and George R. Meek.

At the time said rules were pending and before the same were disposed of by the Court, John M. Shugert presented a petition to the District Court on August 26, 1922, to amend his original petition and the prayer was changed (Record 47 and 48). Notice was given to counsel for said Meek and Mrs. Dale of the application of said Court to amend the original petition, filed by John M. Shugert in the bankruptcy proceeding, of which they accepted service (Record 50 and 51). The petition as amended appears in the record pages 56, 57, 58 and 59.

The amendment was argued before the District Court at the same time that the above rules to quash the subpoenas were argued, and in the same order, in which subpoenas

were quashed, the said Court allowed the amendment (Record 54). To the petition to amend the original petition in bankruptcy no answers were filed and no protest made until after the order allowing same, when the questions involved in this proceeding were raised.

After the allowance by the District Court of said amended petition, subpoenas, as therein prayed for, were issued under the order of said Court and served upon George R. Meek and Florence F. Dale, as well as the other partners, except that no service was had upon Andrew Breeze, but publication was ordered and constructive service made (Record 60, 61, 62, 63 and 64). After the service of said subpoenas, petitions were again presented by the said George R. Meek and Florence F. Dale to the District Court for a motion to show cause why the same should not be quashed and set aside for want of jurisdiction (Record 65 and 74). To these petitions answers were filed by John M. Shugert, alleging, inter alia, that said Court did have jurisdiction of the matters set forth in the amended petition (Record 69 and 78). After argument said Court on October 20, 1922, denied the motions to dismiss (Record 77). From the order thus made by the District Court and that made later as to Andrew Breeze, petitions were filed in the United States Circuit Court of Appeals, for the third district, by the said Meek, Mrs. Dale and Breeze to revise as a matter of law said orders, above referred to, and were allowed by said court. The United States Circuit Court of Appeals heard the cases, affirming the order of the District Court.

BRIEF---ASSIGNMENTS OF ERROR.

After a period of more than three-quarters of a century, involving three bankruptcy acts, and after the present Act has been in force for more than twenty-five years, this Court is requested to hold that one member of a partnership, cannot bring into the bankruptcy Court, the partnership and all its members, where the partnership, as well as the individual members are insolvent; that the District Court had no authority to amend the original petition in bankruptcy; that General Order No. VIII is in effect legislation not authorized by the Act of 1898; that the bankruptcy court has no jurisdiction because one member of the firm died prior to the institution of these proceedings thereby dissolving the partnership, notwithstanding the fact that the present proceedings, prevented the offer in evidence of the partnership agreement, as no trial has yet been had by the District Court to determine who the partners are, if the same should be later controverted, and that a dissolution is fatal, although there is no final settlement as provided by clause (a) of Section 5 of the Bankruptcy Act of 1898.

The questions thus raised by the assignments of error, are grouped and discussed in the following titles:

AUTHORITY OF THE DISTRICT COURT TO AMEND THE ORIGINAL PETITION IN BANKRUPTCY FILED BY JOHN M. SHUGERT:

The petition for the amendment was filed in the District Court August 26, 1922 (Record 47, 48 and 49). Notice of the presentation of this petition was accepted prior to the filing thereof on August 22, 1922, by counsel for George R. Meek and Florence F. Dale.

Where no answer is filed Rule 32 of the United States Equity Rules provides:

> "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in case of an omission to put in an answer."

No answer thereto was filed by said parties. The District Court allowed the amendment in the same order in which he sustained the exceptions to the original petition (Record 54). The amended petition appears in the record, (pages 56, 57, 58, 59) and the subpoena with the caption issued thereon, on page 60.

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

General Order No. XI provides as follows:

> "The Court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."

Rule 19 of the Rules of Equity Practice of the United States provides:

> "The Court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemented matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 43 of the Equity, as to defect of parties, provides:

> "Where the defendant by his answer shall suggest that the bill of complaint is defective for want of parties * * * * * the Court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require."

We deem it unnecessary to cite any authorities to show that the Court had ample power to amend the original petition, to which no objection was made at the time.

AUTHORITY OF ONE PARTNER TO BRING INTO THE BANKRUPTCY COURT THE PARTNERSHIP AND ITS MEMBERS, ON A PETITION FILED BY HIM, WITHOUT THE CONSENT OF THE OTHERS:

Sections 5a and c of the Act of 1898, provide as follows:

"A partnership, during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

"The Court of Bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all the partners, and of the administration of thepartnership and individual property."

Section 36 of the Bankruptcy Act of 1867, provides:

"Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, etc."

This section, as stated by Judge Lowell, in re Carleton 115 Fed. 247:

"Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided *what should happen* after all had been adjudged bankrupt upon the petition of one partner or of a creditor."

It is apparent that the provisions of Section 5 of the Act of 1898 are much broader than those of Section 36 of the Act of 1867. If, as set forth in clause (c) of Section 5 of the Act of 1898, the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual property, how is such jurisdiction to be obtained?

Section 1, defining the "meaning of words and phrases'" as used in the Act of 1898, and proceedings pursuant thereto, in clause 19, provides that the word "person" shall include partnerships. The same construction to the word "person" has also been given by this court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. The same is true of the word "person" in Section 3a of said Act, which provides as an act of bankruptcy by a

person "admitting in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." And Section 3b provides for the filing of an involuntary petition against a "person" which includes a partnership, and being any "person" as set forth in Section 4.

Section 2 defining jurisdiction and territorial limits of a court of bankruptcy, provides, inter alia, that they shall have "such jurisdiction at law and *in equity* as will enable them to exercise original jurisdiction in bankruptcy proceedings, * * * * * to adjudge persons bankrupt who have had their principal place of business, * * * * * within their respective territorial jurisdictions for the preceding six months, * * * * * or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction."

It is, therefore, apparent that the bankruptcy court under the Sections above cited has ample power and authority to declare, upon involunatry petition, all partners bankrupt, whose place of business was within its territorial jurisdiction, who committed one or more of the acts of bankruptcy provided in Section three of said Act, regardless of the fact that some of the members of the firm resided without the territorial district. The same is true of a voluntary petition signed by all members, although some may not reside in the district having jurisdiction of the proceedings.

It will thus be seen that the argument of the learned counsel for the plaintiffs in error, that clauses (c) of Section 5 of the Bankruptcy Act of 1898, "relates to the venue and is territorial in its application," is erroneous. It is illogical to argue that this clause was inserted in the Act for such a purpose, when the Act has already fully provided for the only methods by which plaintiffs in error allege

a partnership and its individual members may be declared bankrupt. If as plaintiffs allege, clause (c) of Section 5 has reference only to venue, why the necessity of clause (a) of the same Section? The former sections of the Act, according to plaintiff's theory, had already provided for the only methods which they admit a partnership can be put into bankruptcy.

The only logical conclusion is that one or more members of a partnership may bring into the bankruptcy court, the partnership, and all its members, by a petition; and if the word "person" as defined in Section 1 shall include the word "partnership" wherever used in the Act, then no act of bankruptcy need be alleged, except that of insolvency, as provided in Section 3. The petition thus filed is voluntary for all jurisdictional purposes of the Court. It may be said to be involuntary to the extent that the non-consenting partners may resist it, as provided by General Order No. VIII, to which we will refer later.

PRACTICE OF BANKRUPTCY COURTS WHERE A PETITION IS FILED BY SOME, BUT NOT ALL OF THE MEMBERS OF THE PARTNERSHIP:

> "Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury." In Re Forbes, 128 Fed. 137.

The opinion by Judge Lowell in the case just cited was commended by this court in Francis vs. McNeal as "an able opinion," and as it involves the same question as the cases at bar, we quote at some length therefrom as follows:

"But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as In re Dunnigan (D. C.) 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estate of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy. Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all its partners. See Vaccaro V. Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Blair (D. C.) 99 Fed. 76; Davis V. Stevens (D. C.) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceedings is noramlly their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time.

The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actually committed by all the partners. Even their privity is not essential. 'An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases.' Lowell on Bankruptcy, 43. A voluntary petition is itself treated as an act of bankruptcy. In re Fowler, I Lowell, 161, Fed. Cas. No. 4, 998; Lowell on Bankruptcy, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner

> have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See In re Murray (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

Section 5 of the Bankruptcy Act had not been before the Supreme Court of the United States, so far as we are able to find, until the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. It is true that it originated by adverse proceedings by creditors. According to the report of this case, Francis had agreed, that if it was later found that he was a partner, that he would turn over his property to such person as the Court might direct. This he subsequently refused to do after a finding that he was a member of the firm. In affirming the judgment this Court stated in effect that he was estopped from denying the authority of the bankruptcy Court by his agreement.

Although an involuntary petition was filed in this case, this Court has so thoroughly construed Section 5, that the principal contentions of the plaintiffs in error, have been thoroughly established, and we, therefore, quote the opinion in full:

> "Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains

as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by Section I, the word 'person,' as used in the act, includes partnership; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequenses admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the conrary, we should infer from Section 5, clauses c, through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt'. (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.)

"In that case, naturally, the partnership property may be administered by the partners not adjudged

bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankrupcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

"On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before. pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one cerainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical reason of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, is an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no objection has been taken but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority of Re Bertenshaw, 17 L. R. A. (N. S.) 886; 85 C. C. A. 61; 157 Fed. 368; 13 Ann. Cas. 986, we

regard it as sustained by the stronger reasons and as correct."

In the case of re Samuels, 215 Fed. 845, where an attempt was made to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent, the Circuit Court of Appeals, Second Circuit, quoted from Judge Lowell in the Forbes case, and cited Francis vs. McNeal as over-ruling certain other cases as follows:

> "We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insolvent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra."

Again in the case of Yungbluth v. Slipper et al, 185 Fed. 773, where it was held that a voluntary assignment of all the property and assets of a firm operating a private bank, to a receiver, though done by one partner and not participated in by the other, the Circuit Court of Appeals, Ninth Circuit, approved of the opinion of Judge Lowell, in re Forbes, and in referring to his opinion, on page 775 said:

> "The true construction of this feature of the bankruptcy law is, we think, best expressed by Judge Lowell, In re Forbes (D. C.) 128 Fed. 137, a case in which, in view of section 5 of the act (Act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. St. 1901, p. 3424),

which provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt, he held that the partnership may not be made bankrupt except by an adjudication of all its partners, *and that the only defense a nonconsenting partner can make to the petition is that the partners are able to pay the partnership debts and their own debts, out of the joint or separate estates.*"

To the same effect is the case of re Carleton, 115 Fed. 246, in which a petition was filed by one member of a partnership, for the purpose of bringing into the bankruptcy court the partnership and his co-partner, the opinion cites authorities to show that neither under the bankruptcy acts of 1841 nor 1867, was it necessary for one partner to bring the partnership and its individual members into Court, to allege any acts of bankruptcy, other than insolvency of the firm and its individual members. In the opinion on pages 247 and 248, it is stated with reference to the Sections relating to partnerships under these Acts and that of 1898, as follows:

"The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

"Section 14 of the act of 1841 provided:

"That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are here exempted. 5 Stat. 448.'

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one part-

ner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

> 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

> " 'In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an

act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. No. 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214, In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 455; Fed. Cas. No. 17,784. * *

"Section 5 of the act of 1898 provides that 'a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.' Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867."

It is apparent that the conflict of decisions under section 5 of the Act of 1898 arose, not from the right of the

bankrupt court to administer the individual property of the non-consenting partner, but whether the latter might be declared a bankrupt on a petition alleging only insolvency of the firm and its members.

It has been almost a universal practice of the bankruptcy courts, where the partnership and one or more, but not all the members of the firm, were adjudicated bankrupts, that the individual property of those not declared bankrupt, was subject to the jurisdiction of the bankruptcy court in the settlement of the partnership indebtedness, and this was held to be the law by the Circuit Court of Appeals, Eighth Circuit, even where, on demurrer, the petition in bankruptcy was dismissed as to the non-consenting partner. Armstrong vs. Fisher, 224 Fed. 97.

The rule that the individual property of a partner not adjudicated a bankrupt, shall be administered in the federal courts, the same as a partner, which has been adjudicated, is unfortunate, and is to be avoided wherever the same may be lawfully done. Not having been adjudicated a bankrupt, such partner may not receive a discharge, as provided by section 14 of the said Act. As was said by the Court in Francis vs. McNeal:

"On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full."

GENERAL ORDER NO. VIII:

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment

of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

General Order No. VIII is as follows:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made."

As a proceeding in Bankruptcy is an equitable one, the Act must be given a liberal construction. General Order No. VIII merely defines the practice under Section 5, relating to partnerships; and the authority to thus prescribe

the same is fully authorized by Section 30 of the Act, above quoted. The rule, therefore, is as much a part of the bankruptcy act as if it was originally a part thereof.

If additional authority were needed, it could be found in the Act of Congress of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. at L. 81) Rev. Stat. 716, which empowers this Court, and the Circuit and District Courts of the United States "to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usuages and principles of law."

> "The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law."
> In re Gerber, 176 Fed. 694.
> Sabin v. Blake-McFall Co., 223 Fed. 505.
> In re Langford, Felts & Myers, 225 Fed. 314.
> In re Hoyt & Mitchell, 127 Fed. 969.

In delivering the opinion of the Circuit Court of Appeals, Brief page 30, Judge Davis, in construing Section 5 and General Order No. VIII stated:

"The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires it to hold that it did? If the Act of 1898 had provided that "a partnership—may be ad-

and its members bankrupts. The District Court declared the partnership and Henry L. Meyer, individually, bankrupts, which adjudication was affirmed by the Circuit Court of Appeals, Second Circuit.

In the case of Vaccaro et al vs. Security Bank of Memphis, et al 103 Fed. 432, the Circuit Court of Appeals, Sixth District, where a partnership was composed of three brothers, A. Vaccaro, one of them having died prior to proceedings in bankruptcy against the partnership, said Court referring to the case of Re Meyer, stated:

> "Again, the act declares that the Court, having jurisdiction of one of the partners, may have jurisdiction of all, 'and of the administration of partnership and individual property.' In re Meyer, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency laws of 1838, as interpreted by the Massachusetts decisions. Philip v. Parker, 2 Cush. 175; Thompson vs. Thompson, 4 Cush. 127; Dearborn v. Keith, 5 Cush. 224; Hanson v. Paige, 3 Gray 239."

In re Stein and Company, 127 Fed. 547, the Circuit Court of Appeals, 7th Circuit, where one of the partners was insane, stated, inter alia, as follows:

> "We perceive no valid reason why this manifest purpose of the bankruptcy act should not have full effect. In the case of a decedent the proper probate court assumes the charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the part-

nership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after payment of partnership debts. So, also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the copartnership debt, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—than an insane person may not be adjudicated a bankrupt (upon which question see In re Pratt, 6 Nat Bankr. Rep. 276, Fed. Cas. No. 11,369; In re Weitzel, 7 Biss, 289; Fed. Cas. No. 17,365), nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject partnership property to the payment of partnership debts and for an adjudication of bankruptcy against the sane partner. The argument in the cases cited is so complete and satisfactory that the subject needs no further discussion."

DISSOLUTION:

Even though a dissolution had occurred by reason of the death of Lavina Catherine Harris, which is not a fact, where there is no final settlement, as provided by paragraph (a), Section 5 of the Act of 1898, the bankrupt Court has jurisdiction over the partnership and its surviving members.

"Under Bankr. Act July 1, 1898, c. 541, Section 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership after its dissolution by the death of one partner may be adjudged a bankrupt, and in such a case the proceedings are not invalidated by the fact that the petition did not refer to the deceased partner nor disclose that the partners named were surviving part-

ners, where the business was being continued as provided in the partnership articles."

In re Coe et al, 157 Fed. 308.

To the same effect is the case of In re Pinson & Co., 180 Fed. 787, where the Court said:

"The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

Although there may be dissolution of the partnership, where assets or debts of a partnership remain, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

Holmes v. Hamilton, et al, 160 Fed. 922.

In the case last cited, in the question of dissolution, Gilbert, Circuit Judge, stated, inter alia, as follows:

"GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution creditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed

his connection months prior thereto, and it is argued that at the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In re Crockett et al, 2 Ben. 514, Fed. Cas. No. 3, 402; In re Foster, 3 Ben. 386, Fed. Cas. No. 4,962; In re Noonan, 3 Biss. 491, Fed. Cas. No 1.0,292; In re Stowers et al, 1 Lowell, 528, Fed. Cas. No. 13,516; In re Rirsch et al (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In re L. Stein & Co., 127 Fed. 547. 62 C. C. A. 272."

It is unnecessary to cite any authorities to show that the Pennsylvania Statute, relative to partnerships, contravenes the Bankruptcy Act of 1898, and that the provisions of the former, cited by the learned counsel for petitioners, are not applicable here.

In the case of Fackleman, 248 Fed. 565, cited by counsel for petitioners, Pomeroy & Fackleman were partners in the grocery business in California; Fackleman sold out to Pomeroy, who continued the business in his own name until the time of his death. Fackleman had moved to Nebraska. Subsequently to the death of Pomeroy, a proceeding in bankruptcy was instituted in the District Court of California, against Fackleman, as surviving partner of Pom-

eroy & Fackleman, and against the latter individually. By reason of the non-residence of Fackleman, and that the firm had been out of existence for a number of years, the court had no jurisdiction.

Neither does the case of in re Evans, 161 Fed. 590, cited by counsel for petitioners, apply. There the partnership consisted of two persons. One member was dead. The other member continued the business for a number of years, and then filed a voluntary petition that he was the sole owner of the business conducted by him after the death of his partner, under the name of Evans & Co. Creditors then intervened to bring in other parties as members. No attempt was made to hold the estate of the deceased partner.

The case of Temple & Workmen, and Temple & Ledyard, Federal Case No. 13825; 23 Fed. Cases 835, cited by counsel for petitioners, does not apply. That case arose under the Bankruptcy Act of 1867, Section 36, relating to partnerships ,made no provision for an adjudication of bankruptcy "after its dissolution and before the final settlement" as provided by Section 5 of the Act of 1898.

In what forum could a proceeding be brought to wind up this copartnership, if not in the bankruptcy court? The insolvent laws of the State are suspended by the bankruptcy Act. There is no act in force in Pennsylvania to wind up the affairs of a bank which consists of a partnership. Such banks are now prohibited in this state by Statute. All State banks are incorporated, and under appropriate legislation are wound up through the State Banking Commissioner; and all National banks through Acts of Congress. We fail to see why a bank, consisting of a partnership, in the absence of express legislation providing for its liquidation, in case of insolvency or dissolution, should not be settled through the bankruptcy courts.

The argument of the learned counsel for plaintiffs in

error, that where the surviving members are adjudicated bankrupt, there is a consequent interference with the administration of the Probate Court, of the estate of the deceased partner, and for that reason, the bankruptcy court should not take jurisdiction, is unsound. If the affairs of the partnership could be liquidated in some other forum, it would certainly not be in the Probate Court. The creditors of the partnership would still be subject to a divided jurisdiction, with no better advantage than under the present proceeding. Whether the partnership creditors of the deceased member of the firm must present their claims in the probate court, is immaterial in this proceeding. Nevertheless, where all of the personal debts of such deceased partner, have been paid out of her individual property, and what is left is applicable only to partnership debts, there is no sound reason why such fund should not be turned over to the receiver or trustee, and thus be brought into hotchpotch for distribution, in the forum, where all creditors of the partnership must in any event present their claims. Necessarily there is a suspension of the power of the Probate Court, to compel partnership creditors to present their claims in that jurisdiction, when all other debts and claims have been settled, and when the only matter involved is a distribution of partnership debts of which another court, under a federal statute, has assumed jurisdiction.

The Bankruptcy Court undoubtedly has acquired jurisdiction of one of the partners, namely, John M. Shugert, and may, therefore, as provided by clause (c) of Section 5 of the Act, have jurisdiction of the others. The authorities show that it was never intended by Congress in passing the act of 1898, that a petitioning partner should be required to allege any other act of bankruptcy than insolvency as against the non-consenting partners. To be compelled to do so, would defeat the very purpose of the act. Undoubtedly, there are many instances where none of the acts of bankruptcy defined in Section 3 have been com-

mitted by any member of a partnership, except that of insolvency. If thereby one member could not bring into court the partnership and its non-consenting members, such petitioner could not be relieved by an individual voluntary petition, of his partnership liability. He might not be insolvent, so far as his individual debts are concerned. He would thus be deprived of the very purpose for which the act was passed, and would be excluded from the express provisions of Section 4 which defines who may or may not become bankrupts.

All the questions of law raised by the petitioners were decided by the Circuit Court in a very lucid opinion by Judge Davis. As a summary of all the questions involved, we quote his opinion, at length, which is as follows:

DAVIS, Circuit Judge. All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoena on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and, second, the part-

nership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5 a and c, of the Act of 1898 provides that:

> (a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. XIII provides that:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by those rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not voluntary petitions in Bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

> "All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires it to hold that it did? If the Act of 1898 has provided that "a partnership—may be adjudged a bankrupt" on the petition of "any creditor", this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "anyone" of the partners, and by "any creditor". The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that: "Any member of a partnership who refuses to *join in* the petition shall be entitled to resist the prayer" etc. By the words "join in", the Supreme Court has in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in". Judge Lowell held in the case of In re Forbes et al. 128 Fed. 137,140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the

partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis v. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt, but the other is not, the bankruptcy court may draw to itself and administer the estate of the other to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong v. Fisher et al, 224 Fed. 97; Francis v. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth v. Slipper et al., 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question." Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al. v. Security Bank of Memphis et al., 130 Fed. 436,443. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts, it will be turned over to the bank-

ruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is AFFIRMED.

In conclusion respondents contend that the Circuit Court made no error in affirming the order of the District Court. It has been the universal practice, with few exceptions, in all of the bankruptcy courts of the United States, to declare all partners bankrupt on the petition of one or more where some have not joined. The exceptions to this rule, are those cases where the Act has been construed to mean that the non-consenting partner could not be declared a bankrupt, but that, nevertheless, the Court had jurisdiction over his individual property for the payment of the partnership debts, thus compelling him to transfer it to the receiver or trustee in bankruptcy. This ruling is contrary to the decision of this Court in Francis vs. McNeal, in that it deprives him of a discharge from his creditors, by whom he may be harassed at any time in the future.

We respectfully submit that the order of the District Court, affirmed by the United States Circuit Court of Appeals, should likewise be affirmed by this Court.

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SUPREME COURT OF THE UNITED STATES

NO. 191 OCTOBER TERM, 1923.

GEORGE R. MEEK,
Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, Bankrupt, and GEORGE H. SHUGERT, Administrator of the Estate of John M. Shugert, Bankrupt.

NO. 192 OCTOBER TERM, 1923.

FLORENCE F. DALE,
Petitioner,

v.

SAME.

NO. 193 OCTOBER TERM, 1923.

ANDREW BREEZE,
Petitioner,

v.

SAME.

Certiorari to Circuit Court of Appeals For Third District.

Supplemental Brief on Behalf of Administrator of John M. Shugert, Deceased, as to Continuance of Proceedings.

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JAMES C. FURST,
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SUPREME COURT OF THE UNITED STATES

NO. 590. OCTOBER TERM, 1923.

GEORGE R. MEEK,
Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, Bankrupt, and GEORGE H. SHUGERT, Administrator of the Estate of John M. Shugert, Bankrupt.

NO. 591. OCTOBER TERM, 1923.

FLORENCE F. DALE,
Petitioner,

v.

SAME.

NO. 592. OCTOBER TERM, 1923.

ANDREW BREEZE,
Petitioner,

v.

SAME.

Certiorari to Circuit Court of Appeals For Third District.

Supplemental Brief on Behalf of Administrator of John M. Shugert, Deceased, as to Continuance of Proceedings.

BRIEF.

The death of John M. Shugert on March 3, 1924, has raised the additional question whether or not the proceedings may be continued.

That Congress intended that no proceeding should abate by the death of a party thereto is plain from the provisions of the Bankruptcy Act of 1898, providing for the application thereto of Courts of equity, and the promulgation of general orders relating to practice. Section 59 provides that a creditor's petition may be amended by additional parties; General Order No. XI provides for amendments to petitions.

Section 8 of said Act provides that:

> "The death or insanity of a bankrupt shall not abate **the proceedings,** but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane," etc.

Under Section 1 (4) the word "bankrupt" shall include a person against whom an involuntary petition * * * * has been filed, or who has filed a voluntary petition; and "creditor" shall include any one who owns a demand or claim provable in bankruptcy.

The executor or administrator of a deceased creditor may prove such claim.

Collier on Bankruptcy, 12th Ed. Vol. 1, p. 787.

That the petition filed in the bankruptcy court by John M. Shugert is involuntary as to the non-consenting partners, is no reason why as to them "the proceedings" should abate. If Shugert had a right under Section 5 of said Act to bring a proceeding in the form voluntary as to himself and involuntary as to his non-consenting partners, we contend that the proper construction of said Section means that no portion of the proceedings should abate, although Shugert in addition to being a debtor, also stood as a creditor so far as his co-partners are concerned. Not only does said Section provide that the death of a bankrupt shall not abate "the proceedings," but it further provides that **"the same** shall be conducted and **concluded** in the same manner, so far as possible, as though he had not died." To hold that the proceedings abated as to the non-consenting partners, would not be to conduct and conclude them in the same manner, as far as possible, as though the bankrupt had not died.

In the case of Shute vs. Patterson, 147 Fed. 509, where an involuntary petition was filed against a bankrupt who died before service of process upon him, and which also involved the bringing upon the record of his executor and the service of process upon the latter, the Circuit Court of Appeals, Eighth District, in its opinion pages 511, 512 and 513, referring to Section 8 of the bankruptcy Act, said:

"By the act of 1898 Congress went further

than the English act of 1883, section 8 of which provides that 'if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive.' See In re Walker, 3 Morrell, Bankr. Cas. 69, and In re Easy, 4 Morrell, Bankr. Cas. 281. It is the exclusive province of Congress to say when such a proceeding shall be deemed to be commenced and pending in a court of bankruptcy, and what effect thereon the subsequent death of the bankrupt shall have, and it does not appear that its purpose was left in doubt. When the proceedings are once commenced the further continuance thereof after the death of the bankrupt is mandatory; it is not left to the discretion of the court. See In re Hicks (D. C.) 107 Fed. 910; Scheuer v. Smith, etc., Co., 50 C. C. A. 312, 112 Fed. 406 * * * *

"So far as bankruptcy proceedings may be considered as in equity and as involving real property, Equity Rules 56 and 57 authorize the bringing in of parties who should be present during their continuance (see Currell v. Villars (C. C.) 72 Fed. 330), but the methods there provided are not well adapted to the quick moving machinery which the act of Congress has authorized courts of bankruptcy to employ. General Order 37 promulgated by the Supreme Court applies here. It provides for the use of the equity rules and the practice and procedure in cases at law, as nearly as may be, and authorizes the modification thereof and a change in the time allowed for return of process, for appearance and pleadings, etc.

"We are of the opinion that the heirs and personal representatives of the deceased bankrupt

should be brought in before adjudication, and that in doing so the court of bankruptcy may after the appropriate orders frame its process, personal or substituted, in analogy to the rules prescribed by the bankruptcy act for process to a bankrupt."

Nor can the non-consenting partners complain that the administrator of John M. Shugert has been substituted upon the record for the purpose of continuing the proceedings.

Under Section 2 of the Bankruptcy Act, bankruptcy courts are invested with equitable powers so as to enable them to exercise original jurisdiction in bankruptcy proceedings. Section 30 of the Act provides that "all necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

> "A bankruptcy court is a court of equity, seeking to administer the law according to its Spirit, and not merely by its letter. Proceedings in bankruptcy generally are in the nature of proceedings in equity, and frequently call for the exercise of full equity powers in the ascertainment and proper enforcement of the equities of the parties; where this is so the Court may apply equitable rules, and will be governed by equitable principles."
> Collier on Bankruptcy, 12th Ed. Vol. 1, p. 25-6.

General Order No. XXXVII, provides inter alia:

> "In the proceedings in equity, instituted for

the purpose of carrying into effect the provisions of this Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be."

Rule 45 of the Courts of equity of the United States provides, in case of the death of a party, for the substitution upon the record of his legal representative.

The Bankruptcy Act makes ample provision, for the substitution upon the record, when necessary, of the legal representative of the deceased bankrupt, and whether the proceeding is voluntary or involuntary; thus providing for the conduct and conclusion of "the proceeding * * * in the same manner, so far as possible" as though he had not died. The following cases are cited as authority on this subject:

Shute et al v. Patterson et al, 147 Fed. 509.
In re Agnew et al, 225 Fed. 650.
In re Hicks, 107 Fed. 910.
In re Larkin, 168 Fed. 100.
Partridge vs. Andrews, 191 Fed. 325.

Consideration may also be given to the fact that Mary C. Harris, a co-partner, whose individual assets are considerably larger than those of any other member of the firm, and who has filed a schedule in the bankruptcy court of her assets and liabilities, has filed no protest. It will probably not be disputed that the net value of her estate is more than twice that of the combined estates of the three appellants.

ADJUDICATION OF PARTNERSHIP AND PETITIONER:

If in the opinion of the Court the proceedings may be continued, and the bankruptcy court is authorized to declare the partnership bankrupt, but not the non-consenting partners, the question whether said court, by petition of the trustee, or otherwise, can compel them to turn over their property to be administered in said court is of vital importance in this case. The question as to the right of the bankruptcy court to declare the partnership without the non-consenting partners, bankrupt, is raised by appellants' fifth and eighth assignments of error (Appellants' Brief, page 6). That the bankruptcy court has such authority, has not been decided by this Court so far as we are able to learn. It has been affirmed in Armstrong vs. Fisher, 224 Fed. 97, and by the United States Circuit Court of Appeals in the present cases (292 Fed. 116).

In conclusion, we contend that if under Section 5 of the Act of 1898, one partner may file a petition to bring into the bankruptcy court the co-partnership and its individual members, so that the partnership property and that of its members may be administered in said Court, then under Section 8 of said Act "the proceedings" will not abate, regardless of the fact that his position as to the non-consenting partners was to some extent that of a creditor. To hold otherwise, would be to ignore that part of said Section which provides that the

proceedings "shall be conducted and concluded in the same manner, so far as possible" as though the bankrupt had not died. It is a fair and reasonable construction of the bankruptcy act to hold that in addition to the definition of the word "bankrupt" as given by Section 1 clause 4, that it includes under Section 5 a partner who files a petition for the purpose of having his individual estate, that of the co-partnership and its individual members, administered in the bankruptcy court.

Respectfully submitted,

SAMUEL D. GETTIG,

JAMES C. FURST,

Attorneys for George H. Shugert, administrator of the Estate of John M. Shugert, deceased.

MEEK *v.* CENTRE COUNTY BANKING CO. ET AL.

DALE *v.* CENTRE COUNTY BANKING CO. ET AL.

BREEZE *v.* CENTRE COUNTY BANKING CO. ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 191, 192, 193. Argued March 13, 1924; reargued November 26, 1924.—Decided May 25, 1925.

1. When the petitioner in an involuntary bankruptcy proceeding dies before adjudication, the proceeding does not abate but under Rev. Stats. § 955 may be prosecuted by his personal representative. P. 428.
2. The Bankruptcy Act gives no authority to adjudge a partnership bankrupt upon a petition filed against it by but one of its members. P. 431.
3. Section 5c of the Bankruptcy Act providing that the court of bankruptcy having jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property, relates solely to the venue or the territorial jurisdiction of the court. P. 431.
4. A petition by a partner to have himself, the partnership and the other partners declared bankrupt, and not purporting to be a petition of the partnership or authorized by it, can not be regarded as a voluntary petition of the partnership. P. 432.
5. An involuntary petition against a partnership must be filed by creditors and allege an act of bankruptcy. P. 432.
6. The authority conferred on this Court by § 30 of the Bankruptcy Act to prescribe all necessary rules, forms and orders as to procedure and for carrying the Act into effect, is limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions. P. 434.
7. General Order No. 8 and Form No. 2, in purporting to authorize one or less than all the partners to file a petition against the partnership without the consent of the others, do not relate to the execution of any of the provisions of the Act itself, and are therefore without statutory warrant and of no effect. P. 434.

8. A petition by a partner not maintainable against the partnership *held* not maintainable against non-consenting partners individually. P. 434.

292 Fed. 116, reversed.

CERTIORARI to judgments of the Circuit Court of Appeals which affirmed orders of the District Court denying motions to dismiss, *pro tanto*, a petition in bankruptcy. General Order in Bankruptcy No. 8 and Form No. 2, were abrogated by order of May 25, 1925.

Messrs. Mortimer C. Rhone and *Ellis L. Orvis*, with whom *Messrs. Harry Keller* and *R. L. Bigelow* were on the briefs, for petitioners.

Messrs. Samuel D. Gettig and *Newton B. Spangler*, with whom *Mr. James C. Furst* was on the brief, for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These three cases involve the same proceedings which were before us at an earlier stage in *Meek* v. *Centre Banking Co.*, 264 U. S. 499. They rose out of a petition in bankruptcy filed by the respondent Shugert in a Federal District Court in Pennsylvania for the adjudication as bankrupts (a) of himself, (b) of a partnership styled the Centre County Banking Co., in which he and the present petitioners, Meek, Dale and Breeze, hereinafter called the defendants, were alleged to be members, and (c) of the defendants individually. The defendants resisted the petition in so far as it sought to have the partnership and themselves adjudged bankrupts, and moved to dismiss it to that extent. Orders denying these motions were entered by the District Court; and these, on petitions to revise, were affirmed by the Circuit Court of Appeals. 292 Fed. 116. Writs of certiorari were then granted. 263 U. S. 696.

Thereafter, but before the hearing in this court, Shugert died. The defendants then moved in this court that the proceeding in bankruptcy be dismissed as to them, both individually and as members of the partnership, on the ground that to that extent it abated by Shugert's death. Finding the petition to be in this aspect an involuntary and antagonistic proceeding, and there being then no adversary party before the court, we granted leave to any persons claiming to be representatives of Shugert's interest to appear within thirty days and apply for leave to be admitted as parties for the purpose of continuing the proceeding in his stead; stating that if this were done the question whether the proceeding should be dismissed as to the partnership and the defendants, or continued as to them by such representatives, would then be determined. *Meek* v. *Centre County Bank, supra,* p. 504. Thereafter the administrator of Shugert's estate seasonably appeared and applied for leave to be substituted in Shugert's place as the petitioner in the bankruptcy proceeding. The defendants renewed their motions to dismiss; and the cases have been heard both on this preliminary issue and on the merits of the controversy.

1. The first question to be determined is whether Shugert's death before an adjudication had been made under the petition, abated the bankruptcy proceeding as against the partnership and the individual defendants, or whether it may be continued against them by the administrator of his estate. When either of the parties in any suit in any court of the United States dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend the suit to final judgment. Rev. Stat. § 955. In *Schreiber* v. *Sharpless,* 110 U. S. 76, 80, a suit on a federal penal statute, in which the defendant had died before judgment, it was held that whether an action survives and may be continued under this section "de-

pends on the substance of the cause of action;" and that, since at common law actions on penal statutes do not survive and Congress had not established any other rule in respect to actions on federal penal statutes, the cause of action died with the person of the defendant and the suit could not be continued against his personal representative. We do not think, however, that the doctrine of this case applies to an involuntary proceeding in bankruptcy.

Such a proceeding, not being in the nature of a common law action, is not abated by any rule of the common law. And while there is no express provision in the Bankruptcy Act [1] that the cause of action survives the death of a petitioner before adjudication, we think that such survivorship accords with the "substance of the cause of action" and the nature and purpose of a proceeding in bankruptcy, which is not a mere personal action, but is essentially in the nature of a proceeding *in rem* for the benefit of all the defendant's creditors. And the filing of the petition brings his property *in custodia legis,* with a view to a determination of his status and the settlement and distribution of his estate. *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300, 307; *Lazarus* v. *Prentice,* 234 U. S. 263, 266. We conclude that an administrative proceeding of this character, in which the property of the defendant is impounded for the benefit of all of his creditors, does not abate because of the death of the petitioner before adjudication and that its prosecution may be continued by his personal representative. The motions of the defendants to dismiss the proceeding by reason of Shugert's death are accordingly denied; and the administrator is granted leave to be substituted as the petitioner in the proceeding and to prosecute it in his stead.

2. This brings us to the consideration, on the merits, of the motions made by the defendants in the District

[1] Act of July 1, 1898, c. 541, 30 Stat. 544.

Court to dismiss Shugert's petition in so far as it sought the adjudication of the partnership and of themselves as bankrupts. The petition combined, in an anomalous and modified fashion, a "debtor's petition" and a "partnership petition" (Bankruptcy Forms, Nos. 1 and 2), with other averments. In it Shugert alleged that the partnership was insolvent and owed debts in excess of $1,000; that each of the partners was insolvent and they were unable, jointly or severally, to pay the partnership debts; that he and the partnership were willing to surrender their property for the benefit of their creditors and desired to obtain the benefits of the bankruptcy law; and that the defendants had not offered to join in the petition and he was not informed of their intention in the matter. It did not allege that either the partnership or the defendants had committed any act of bankruptcy. The prayer was that Shugert, the partnership, and the defendants individually, be adjudged bankrupt; that process be served upon the defendants; and that proceedings be had as provided by the bankruptcy law and General Order No. 8.

The defendants, who appeared specially, moved to dismiss the petition as against the partnership and themselves on the grounds, among others, that it was not authorized by the Bankruptcy Act and that the court had no authority under it to adjudge either the partnership or non-consenting partners bankrupt.[2] The orders of the District Court denying these motions were affirmed by the Circuit Court of Appeals on the ground that the petition was maintainable under § 5 of the Bankruptcy Act and General Order No. 8.

Section 5a of the Bankruptcy Act specifically provides that "A partnership, during the continuation of the partnership business, or after its dissolution and before the

[2] Two of the defendants also denied that they were members of the partnership.

final settlement thereof, may be adjudged a bankrupt." There hence can be no doubt that a partnership may be adjudged a bankrupt as a distinct legal entity. But since the Act does not specify when it may be adjudged a bankrupt, to determine this question reference must be had to the general provisions of the Act, in which, in accordance with § 1(19), the word "persons" is to be construed as including "partnerships." The Act makes provision for only two kinds of petitions upon which a person may be adjudged bankrupt; one, a voluntary petition filed by him; the other, an involuntary petition filed against him by creditors. As to the first, it is provided that any qualified person, except certain specified corporations, may file a petition to be adjudged a voluntary bankrupt, §§ 4, 59a; and as to the second, that creditors having provable claims of a specified amount against an insolvent debtor who has committed an act of bankruptcy within the preceding four months, may file a petition to have him adjudged a bankrupt, §§ 3b, 59b.[3] As there is no other provision authorizing the filing of a petition in bankruptcy, it necessarily results that there is no authority under the Act to adjudge a partnership bankrupt except upon its own voluntary petition or upon an involuntary petition filed against it by creditors; and none to make such an adjudication upon a petition filed against it by one of its members.

There is nothing in § 5c of the Bankruptcy Act, upon which the administrator relies, that has any application to this question. It merely provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property;

[3]At least three creditors are required unless all the creditors are less than twelve in number, in which case one creditor may file the petition. § 59b.

that is, it goes solely to the question of venue or jurisdiction of the bankruptcy court with reference to its territorial limits. See § 2. And the decision in *Francis* v. *McNeal*, 228 U. S. 695, only involved the question whether in a bankruptcy proceeding in which a partnership had been adjudged bankrupt under an involuntary petition filed against it by creditors, the court might administer the separate estate of a partner who had not been adjudged bankrupt individually.

It is clear that the present petition cannot be sustained as the voluntary petition of the partnership for its own adjudication in bankruptcy. It was filed and signed by Shugert alone, as the sole petitioner. It did not purport to be filed by the partnership, and was not signed by it or in its behalf. And while there was an incidental averment that the partnership desired to obtain the benefit of the bankruptcy law, there was no allegation that this statement was authorized by the partnership. On the contrary it was shown that the other partners had not joined in the petition and that their intention in reference to the matter was not known. In short, the petition was framed as an involuntary petition against the partnership and its non-consenting members, and its sufficiency must be tested as such. We are therefore not called upon to determine whether a voluntary petition filed in the name of the partnership by one member of the firm purporting to act in its behalf, could be sustained without an affirmative showing that it was filed at the instance or with the consent of the other partners.

It is also clear that the petition cannot be sustained as an involuntary petition filed against the partnership under the provisions of the Bankruptcy Act, since it was not filed by creditors, the only persons authorized to file such a petition, and furthermore did not allege that the partnership had committed an act of bankruptcy.

It is earnestly insisted, however, that the right of a partner to file such a petition against the partnership is

recognized by General Order in Bankruptcy No. 8. This General Order provides that any member of a partnership who refuses to join in a petition to have the partnership declared bankrupt shall be entitled to resist the petition in the same manner as if it had been filed by a creditor of the partnership; that notice shall be given to him as in the case of a debtor petitioned against; that he shall have the right to appear at the hearings and make proof that the partnership is not insolvent and has not committed an act of bankruptcy, and make all defences which any debtor proceeded against might make; and that if an adjudication of bankruptcy is made upon the petition, such partner shall file a schedule of his debts and inventory of his property as required in cases of debtors against whom an adjudication is made. 172 U. S., Appendix, p. 656. It is supplemented by Bankruptcy Form No. 2, providing for a petition by less than all the members of a firm, alleging that they and the other partners owe debts which they are unable to pay in full, and that the petitioners desire to obtain the benefit of the Bankruptcy Act; and praying that the firm be adjudged bankrupt. 172 U. S., Appendix, p. 679.

It is clear that this General Order and Form contemplate that less than all the members of a partnership may file a petition for its adjudication as a bankrupt, without alleging either that it is insolvent or that it has committed an act of bankruptcy, and that any member of the partnership who refuses to join in the petition may resist it in the same manner as if the petition had been filed by a creditor. In seeking to have the partnership adjudged bankrupt as against the non-consenting partners resisting such an adjudication, it is manifestly an involuntary proceeding. *Meek* v. *Centre County Bank, supra,* p. 502.

The question of the effect of this General Order and Form are now for the first time presented to this court for determination.

The authority conferred upon this court by § 30 of the Bankruptcy Act to prescribe all necessary rules, forms and orders as to procedure and for carrying the Act into effect, is plainly limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions. *West Company* v. *Lea*, 174 U. S. 590, 599. And see *Orcutt Company* v. *Green*, 204 U. S. 96, 102.

General Order No. 8 was evidently taken from a like general order under the Bankruptcy Act of 1867, of which it is in the main a transcript; and Form No. 2 is largely a copy of a corresponding form prescribed under said earlier Act.[4] The Act of 1867, however, while not providing that a partnership could be adjudged a bankrupt as a separate entity, expressly provided that its property should be taken and administered in cases "where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners *or any one of them*, or on the petition of any creditors of the partners." 14 Stat. 517, c. 176, § 36. The former general order and form were, therefore, appropriate methods of procedure for carrying into effect the provision as to petitions by one of the partners. In the present Act, however, there is no corresponding provision for adjudging a partnership bankrupt or administering its property upon the petition of one of the partners. General Order No. 8 and Form No. 2, in purporting to authorize one or less than all of the partners to file a petition against the partnership without the consent of the others, do not relate to the execution of any of the provisions of the Act itself; and therefore are without statutory warrant and of no effect.

We conclude that Shugert's petition was not maintainable against the partnership. And, *a fortiori*, it was not

[4] Brightly's Bankrupt Law: Gen. Ord. No. 18, p. 105; Form No. 2, p. 142.

maintainable as an involuntary petition against the non-consenting partners individually.

The motions made by the defendants in the District Court to dismiss the petition as against the partnership and themselves individually should have been granted. The decree of the Circuit Court of Appeals is accordingly reversed, and the cause remanded to the District Court for further proceedings in conformity to this opinion.

Decree reversed.